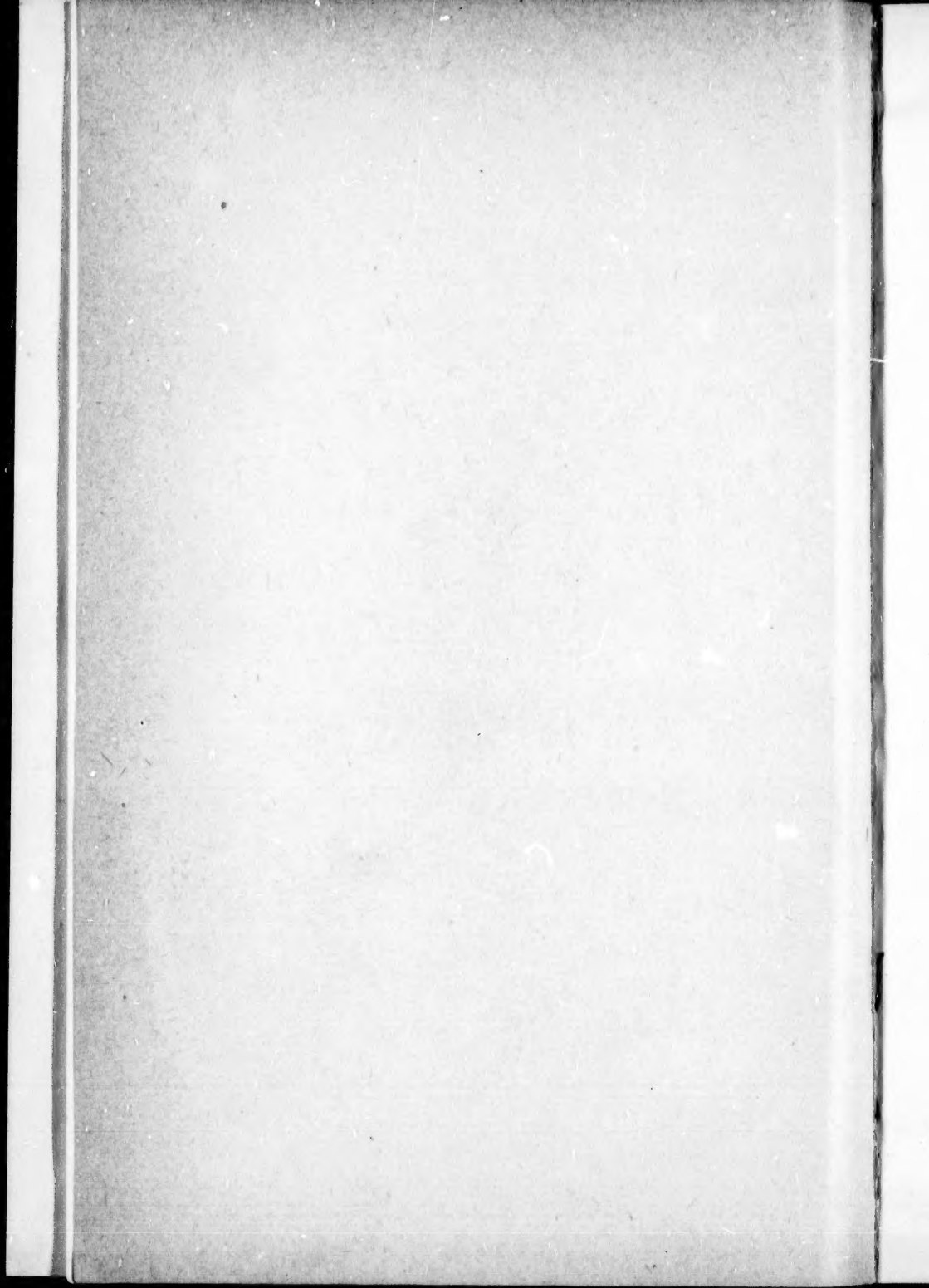




ABBOTT
ON THE
RAILWAY LAW OF CANADA.

A TREATISE
ON THE
RAILWAY LAW OF CANADA.

EMBRACING

Constitutional Law.—The Law of Corporations.—Railway Securities.—
Eminent Domain.—Contracts.—Common Carriers.—Negligence.—
Damages.—Master and Servant.—Text of Dominion and
Provincial Railway Acts, etc.—Forms of Pro-
ceedings in Expropriation.

BY

HARRY ABBOTT, Q.C.

OF THE MONTREAL BAR,

Professor of Commercial Law, McGill University.

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TO THE

HONOURABLE MELBOURNE MacTAGGART TAIT, D.C.L.,
ACTING CHIEF JUSTICE OF THE SUPERIOR COURT FOR
THE DISTRICT OF MONTREAL,

by C. Theoret,

In admiration of his great ability and sterling qualities; and in grateful
remembrance and acknowledgment of much kindness and
courtesy, both while associated with him at the
Bar and after his elevation to the Bench,

THIS WORK

Is respectfully dedicated

By the Author.

PREFACE.

The author does not presume to offer this work to the public and the profession as a complete treatise on Railway Law generally, but, as he hopes it may prove to be, a useful handbook of the law applicable to railway companies in this country ; and he trusts it may supply, in a practical and useful form, a want which has been felt for such a book. No attempt has been made to reproduce the enormous mass of English and American jurisprudence in railway cases ; nor does the author pretend to give the whole jurisprudence of this country, but believes that the reader will find in the ensuing pages most of the leading cases of authority bearing upon the majority of questions affecting railways which have arisen in this country. References will be found to some American cases which have seemed particularly in point, or which illustrate questions not authoritatively decided in this country, but generally the leading American text-writers have been quoted. A freer use has been made of the jurisprudence of the English Courts and of English text-writers, either in cases arising under English statutes similar to our own, or to explain the English law on any given point. References are also made to the jurisprudence and text-writers of France ; but more sparingly, as the statute law of that country affecting railways is in many respects radically different from our own.

The author must crave the indulgence of his professional brethren in other provinces than Quebec, if they miss many familiar faces in their jurisprudence omitted in this work. They must attribute such omissions rather to his

PREFACE.

unfamiliarity, as a member of the Quebec Bar, with their case law, than to any failure of effort of research on his part to ascertain its leading principles.

The general scheme of the book has been to give, as far as possible, in consecutive order and sequence, the principles of law, statutory or otherwise, governing railway companies, in their incorporation and organization, in the obtaining of financial means to carry on the undertaking, the acquiring of land and rights of way, the construction of the road, its operation, and the rights and liabilities consequent upon the exercise of their powers and the carrying on of railway business. In addition, there has been printed in an appendix the text of the Railway Act, with references in each section to any differences in the various Provincial Acts, the sections of the Criminal Code, and some special statutes, affecting railways, as well as some forms, which it is hoped may prove of use to the practitioner.

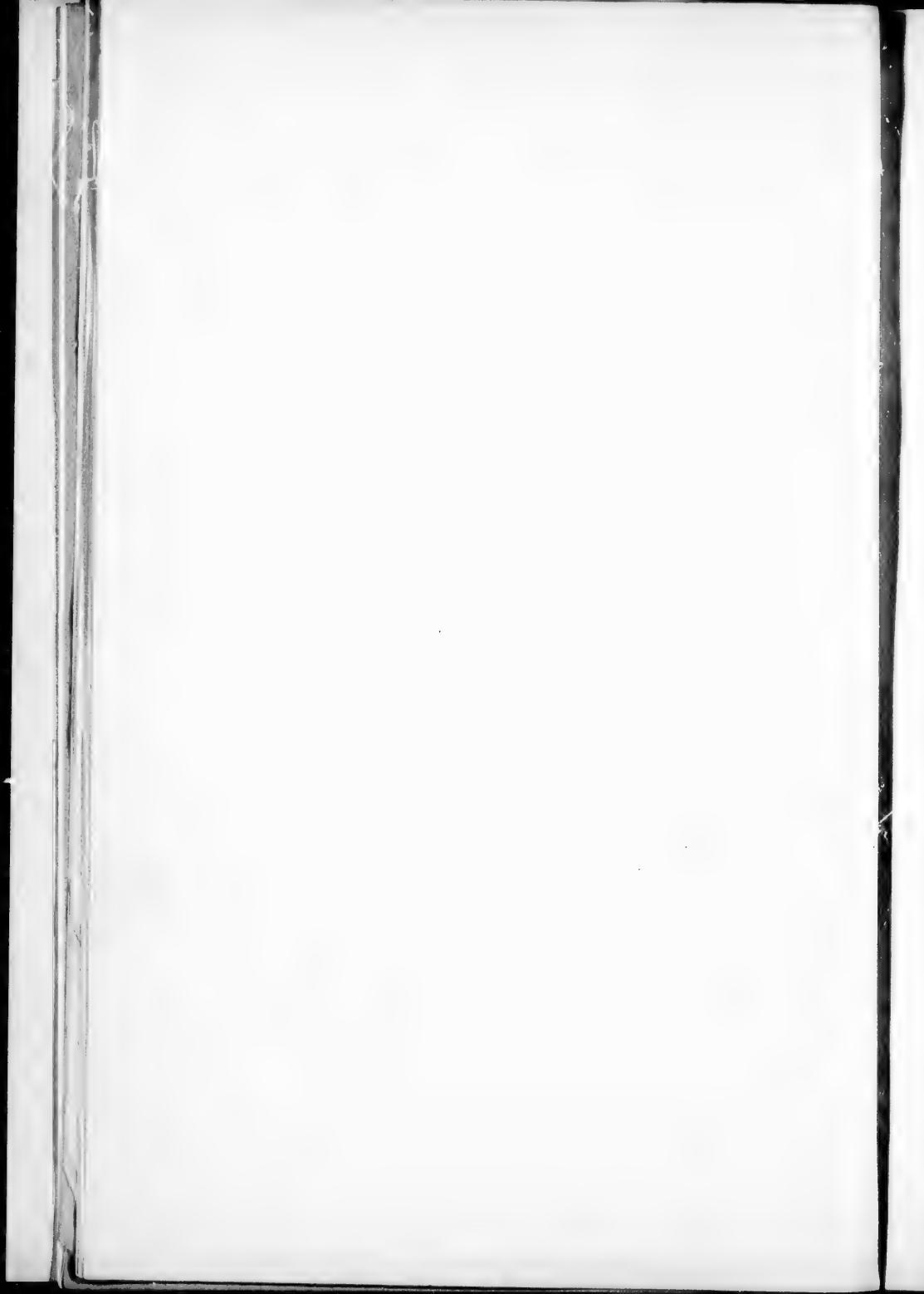
The author cannot let this book go forth from the press without acknowledging his great indebtedness to Mr. F. L. Snow, Librarian to the New York Life Insurance Company in Montreal, for valuable assistance in collecting material for, and in the compiling of, this book; and to Mr. R. T. Heneker, of the Montreal Bar, in kindly giving access to his private collection of Railway cases.

H. A.

MONTREAL, 29th February, 1896.

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LIST OF ABBREVIATIONS
OF
CANADIAN REPORTS.

Grant's Chy.....	Upper Canada Chancery Reports.
U. C. C. P.....	Upper Canada Common Pleas.
U. C. Q. B.....	Upper Canada Queen's Bench.
O. R.....	Ontario Reports.
Ont. P. R.....	Ontario Practice Reports.
Ont. A. R.....	Ontario Appeal Reports.
L. C. R.....	Lower Canada Reports.
L. C. J.....	Lower Canada Jurist.
R. L.....	Revue Légale.
M. L. R., S. C.....	Montreal Law Reports Superior Court.
M. L. R., Q. B.....	" " " Queen's Bench.
L. N.....	Legal News (Montreal).
L. C. L. J.....	Lower Canada Law Journal.
Rev. de Lég.....	Revue de Législation.
Q. L. R.....	Quebec Law Reports.
Q. R., S. C.....	Quebec Official Reports Superior Court.
Q. R., Q. B.....	Quebec Official Reports Queen's Bench.
M. L. D. & R.....	Monthly Law Digest & Reporter (Montreal).
Man.....	Manitoba.
N. W. T. Rep.....	North West Territories Reports.
B. C.....	British Columbia.
Geld & Oxley.....	Nova Scotia Reports.
Russell and Geldert.....	" "
N. S.....	" "
Pugs.....	New Brunswick Reports.
N. B.....	" "
S. C. R.....	Supreme Court Reports, Canada.
R.....	"The Reports" England

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A TREATISE

ON THE

Railway Law of Canada.

CHAPTER I.

INTRODUCTORY.

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| <ol style="list-style-type: none"> 1. <i>The franchise.</i> 2. <i>Federal and Provincial Acts.</i> 3. <i>Who may construct and operate railways.</i> 4. <i>Questions of jurisdiction.</i> 5. <i>Special and general Acts.</i> | <ol style="list-style-type: none"> 6. <i>Constructed or to be constructed under the authority of any Act passed by the Parliament of Canada.</i> 7. <i>Provincial Legislation may be confirmed.</i> 8. <i>Effect of Sec. 306 of The Railway Act.</i> |
|--|---|

1. Railways in this country exist exclusively in virtue of legislative authority, and are invariably constructed and operated by incorporated companies subject to statutory conditions and limitations. The franchise.

It is true that it has been held in England and the United States that any individual may construct and operate a railway, either upon his own land, or that of others with the owner's consent; but he does so at his own risk, and is liable not only civilly for all damages and annoyance caused to his neighbors by the construction and operation of the railway and the noise and smoke of trains, etc., but criminally by indictment for creating a public nuisance. (1) We must therefore conclude in the language of Crompton, J., in *Regina v. Train*, (2) that "the legal carrying out of such a scheme can only be effected by authority of Parliament." In other words, the legislative authority is required to protect railway companies from the consequences

(1) *Regina v. Train*, 3 F. & F. 22. (2) 3 F. & F. 22.

of the doing of that which would otherwise amount to a public nuisance.

In this country then we may safely say that railways can be legally constructed and operated only under the authority and powers granted by the Legislature.

Federal and
Provincial
Acts.

2. It may be convenient to point out here what railways come under the jurisdiction of the Federal, and what under that of the Provincial, Legislatures.

Companies whose authority to construct and operate a railway is derived from the Parliament of the Dominion, with the exception of government railways, are subject to the provisions of the Dominion Railway Act, (1) and all railways which have been declared by Act of Parliament to be works for the general advantage of Canada, and all railways crossing or connecting therewith, are also subject to the provisions of that Act, (2) with the exception of those provisions relating to the organization of the company, meetings of shareholders, capital stock, payment of dividends, etc., and internal economy generally. (3) The Act at present in force is that passed in the month of May, 1888, known as "The Railway Act, 51 Vic., Chap. 29"; and the provisions referred to are contained in sections 32 to 89 respectively. These provisions may be made applicable to any railway within the legislative authority of Canada, by order of the Governor-in-Council, upon application after public notice in the *Canada Gazette*. (4) Railways which are constructed and operated under authority granted by the Legislature of any of the Provinces, and which have not been declared by Act of the Federal Parliament to be works for the general advantage of Canada, are under the control of the Legislatures of the Provinces, and are subject to the provisions of the Provincial Acts. It is unnecessary to specify the different railways which are subject to the authority of the different Legislatures, but there might be mentioned as instances the Intercolonial Railway, the Grand Trunk Railway, and the Canadian Pacific Railway, as having been declared to be works for the general advantage of Canada, and being subject to the legislative authority of the Dominion Parliament;

(1) The Railway Act, 51 Vic., c p. 29, secs. 3 and 5.

(2) The Railway Act, sec. 306.

(3) Ibid, sec. 5.

(4) The Railway Act, sec. 7.

(1) while purely local roads, within the limits of any one Province, and which do not connect with or cross such roads as those above mentioned, are subject to the authority of the Provincial Legislatures. It is provided in addition by sec. 4 of The Railway Act, that all provisions of the Act relating to any matter within the legislative authority of Canada shall apply to all railways, whether otherwise within the legislative authority of the Federal Parliament or not. The section specifies as examples all provisions relating to the crossing and junction of one railway with another, offences, and penalties, and statistics. The Provincial Railway Acts also contain provisions on these subjects, and there would here appear to be a conflict of legislative jurisdiction. It is not, however, within the scope of this work to consider at any length constitutional questions, except in so far as they may arise incidentally in connection with any particular point that may need to be discussed. For the present, therefore, it is proposed to pass over such questions and to consider the Statutes under which railways in this country exist and are carried on, and where we find a clashing of Federal and Provincial legislation, to discuss the constitutional questions as they arise.

In so far as concerns the incorporation of railway companies, their subsequent organization, their powers, their operation and their rights and liabilities, the references will be generally confined to the Dominion Railway Act, which is the most important, not only in that its provisions govern most of the railways in this country, but inasmuch as Provincial legislation has hitherto been framed, generally speaking, on the lines of the Dominion Act. References to the Provincial Acts will be limited to those points on which they differ in some essential feature from the Dominion Act. (2) The first questions to be considered are as to who can construct and operate railways, and what the law requires should be done by them before they can commence construction and operation.

3. First, as to who may construct or operate a railway. In Who may construct and operate railways. this country, as a matter of practice, railways are entirely constructed and operated by incorporated companies. According to the interpretation clause of The Railway Act, the word "com-

(1) The Ry. Act, sec. 306. (2) For further differences see Appendix.

pany" includes any "person" having authority to construct or operate a railway; (1) but a perusal of the Act would lead one to believe that the Legislature never intended that any natural person should be authorized to construct and operate a railway for public business; though in certain particular instances railways may be operated by persons not having corporate powers nor special legislative authority, under certain restrictions and for a limited period of time. For instance, it is provided by the Act that if a railway should be sold under any lawful proceeding, and purchased by any person or corporation not having legislative authority to hold and operate the railway, the purchaser may operate such railway and collect tolls and fares for the carriage of goods and passengers, just as the company previously operating it could have done, subject to the restrictions and conditions provided by the Act. (2) With this exception it may be said that all railways in this country are constructed and operated by incorporated companies.

Questions of
jurisdiction.

4. In the Provinces, if the railway is for provincial purposes only, and is confined to the limits of the Province, the companies are incorporated by Act of the Provincial Legislature, and they are governed by the provisions of the special Act incorporating them, and the general provisions of the Provincial Railway Act, in so far as they are not excepted by the special Act. On the other hand, railways which connect one Province with any other or others of the Provinces, or which extend beyond the limits of the Province, are subject to the exclusive jurisdiction of the Dominion Parliament and to the provisions of the Dominion Railway Act, (3) except in so far as those provisions may be excepted by the special Act incorporating the company, and this can be done by enacting in the special Act that the sections of the general Act proposed to be excepted shall not be incorporated in the special Act. Also all railways, which, though wholly situate within the Province, are, before or after their construction, declared to be for the general advantage of Canada or for the advantage of two or more of the Provinces, are subject to the

(1) Sec. 2 (a).

(2) Secs. 278-280. There is no such provision contained, however, in the Provincial Acts, and the purchaser of a local railway would have to apply to the Legislature for authority before he could operate it.

(3) B. N. A. Act, secs. 91, 92, § 10 (a).

exclusive jurisdiction of the Dominion Parliament, (1) but are not subject to secs. 32 to 89 of The Railway Act, unless constructed under the authority of an Act of the Dominion Parliament, or unless these sections are made specially applicable to the particular railway or company in the manner provided by The Railway Act. (2) There here arises an apparent difficulty as to the jurisdiction of the Local and Federal Legislatures in the case of a local railway declared to be for the general advantage of Canada, or crossing or connecting with a railway under the Federal authority. Sub-section 10 (c) of section 92 of the B. N. A. Act would seem to bring the two jurisdictions into direct collision. A railway company incorporated under a local Act, and for a purely local purpose, is within the exclusive jurisdiction of the local Legislature; but as soon as the railway is declared to be a work for the general advantage of Canada, it comes under the Federal jurisdiction. What then becomes of the special and general local legislation affecting such railway? In the Dominion Act of 1883, (3) as amended, it was specially provided that: "Nothing in this section shall in any way affect or render inoperative the provisions of any Act of a local Legislature heretofore passed, authorizing the construction and running of any such railway or branch line" (*i.e.*, railways or branch lines crossing or connecting with railways under Dominion authority), "or any act amending the same; but hereafter the same shall be subject to the legislative authority of the Parliament of Canada." Even the Act containing this section was open to some doubt on the subject, as seen in the case of *Corp. of St. Joseph v. Quebec Central Railway*. (4) This was the case of a local railway brought under Federal jurisdiction by crossing the Intercolonial Railway; and Ramsay, J., held that the provisions of the local Act of 1880 (Que.) with regard to penalties for obstructing highways were not abrogated in the case of this railway by the Dominion Act, but remained in force, and applied to the railways for which it was framed and of whose character it was part. However, this holding may be said to be *obiter*, inasmuch as the point decided by the Court was, that under either the Dominion or the Quebec Act, a justice of the peace

(1) B. N. A. Act, sec. 92, § 10 (c).

(2) Secs. 5, 7.

(3) 46 Vic., ch. 24, sec. 6, ss. 2.

(4) 11 Q. L. R. 193.

had jurisdiction to hear and decide a complaint against a railway company for obstructing a highway. But in the Revised Statutes of Canada and the present Act of 1888, the above subsection was changed, and now reads as follows : (1)

"Every such railway and branch line shall hereafter be subject to the legislative authority of the Parliament of Canada ; but the provisions of any Act of the Legislature of any Province of Canada, passed prior to the 25th May, 1883, relating to any such railway or branch line, and in force at that date, shall remain in force so far as they are consistent with any Act of the Parliament of Canada passed after that date."

Special and
general Acts.

5. The effect of this clause in deciding as to what statutory enactment would apply is open to some doubt in many instances, and so far the jurisprudence has not thrown much light upon the subject. For instance, it is customary to include in the Act of incorporation the whole or a large part of the general Act by which the railway will be governed, and unless excepted by the special Act the general Act of the Province in which the line is to be constructed (if a local work) is made to apply to the railway company seeking incorporation, and is expressly declared to form part of the special Act and to be construed therewith as forming one Act. (2)

Suppose the case of a local railway, incorporated by a Provincial Statute, and having the provisions of the Provincial Railway Act incorporated in its charter, being declared a railway for the general advantage of Canada. The difficulty is to decide whether and to what extent the provisions of the Provincial Act would remain in force and apply to such railway. According to sec. 307 of The Railway Act, such provisions as were in force prior to 25th May, 1883, would remain in force so far as they would be found to be consistent with any Act of the Dominion passed after that date. And it would be for the courts to decide whether they were consistent or not.

Again, special provision is made by sec. 6 of The Railway Act, that if in any special Act it is provided that any provision of any general railway Act, in force at the time of the passing of the special Act, is excepted from incorporation therewith, or if the

(1) Sec. 307 Ry. Act, 1888.

(2) See Quebec Ry. Act, 1880, ch. 43, sec. 2, sub-sec. 2.

application of any such provision is extended, limited, or qualified, the corresponding provision of The Railway Act shall be excepted, extended, limited, or qualified in like manner. (1)

It would seem from the language of this section that if there were no provisions in the present Act corresponding to the thus extended, limited, or qualified provisions of the former general Act, the latter provisions would stand. But it is to be regretted that the language of the statute is not more explicit.

Cases have arisen before our courts where these questions have been discussed or touched upon, with the result that some of the light of jurisprudence may be thrown upon the subject.

For instance, the question recently came before our courts as to whether the Grand Trunk Railway Company was obliged to construct a farm crossing for each subdivision of a lot of land, and the point was raised as to whether the relevant clauses of The Railway Clauses Consolidation Act (2) or those of the present Act applied.

The Grand Trunk Railway Company was incorporated by 16 Vic. (1852), ch. 37. At that time The Railway Clauses Consolidation Act (3) was in force, and by section 2 of the Grand Trunk Railway Act of Incorporation, it was specially enacted that certain sections of The Railway Consolidation Clauses Act should be incorporated with the special Act. It was held that the relevant sections of the Consolidation Act applied; (4) but, as Bossé, J., remarked, "as the charter required the company to construct farm crossings, it is unnecessary to discuss the subsequent general statutes." (5)

In *Zimmer v. Grand Trunk Railway*, (6) the question came up in the Divisional Court as to whether, supposing for argument's sake that the original "Railway Clauses Consolidation Act" had been repealed, the Grand Trunk Railway Act, (7) not hav-

(1) By the Act incorporating the Can. Pac. Ry. Co., 44 Vic., ch. 1, the provisions of the Consolidated Ry. Act of 1879 are made applicable to the building of the Can. Pac. Ry. Co., in so far as they are not inconsistent with or contrary to the said Act of Incorporation. C. P. R. Co. v. Major, 13 S. C. R. 233, 9 L. N. 410, 1887.

(2) 14 & 15 Vic., c. 51.

(3) 14 & 15 Vic., c. 51.

(4) *Cie du Grand Tronc v. Huard*, 1 R. J. Q. 501 (Q. B.).

(5) *Ibid.*, p. 508.

(6) 21 O.R. 628, confirmed in appeal, but on different grounds by 19 Ont. App. 693.

(7) 16 Vic., cap. 37.

ing been repealed, those clauses of the Consolidation Act which were incorporated in it were not thereby repealed.

Robertson, J., admitted that as a general rule this contention could be upheld, but found in the particular Act a special provision whereby Parliament had reserved to itself the right to amend or enlarge any of the clauses which by the special Act incorporated therewith any of the clauses of the general Act. (1) In appeal this point was not decided, but Mr. McCarthy, Q.C., and Mr. Nesbitt for the Grand Trunk Railway maintained that the Consolidated Statutes of Canada (1859) did not repeal the clauses of 14 and 15 Vic., c. 51, but re-enacted them. (2)

It is somewhat difficult to arrive at a conclusion from the foregoing, but the following is suggested by the author: Section 307 of The Railway Act lays down a general principle, that all Acts of Provincial Legislatures relating to the now Dominion railways (as we may call them for convenience), enacted prior to 1883, are to remain in force so far as they are consistent with any Dominion Act passed after that date; but under secs. 5 and 6, even when the Provincial legislation prior to 1883 does conflict with Dominion legislation passed after that date, if such Provincial legislation is incorporated in the company's charter, the same must prevail as against the provisions of The Railway Act. And where the provisions of the Provincial general Act have been excepted, extended, limited or qualified by the special Act, the corresponding provisions of the Dominion Act shall be excepted, extended, limited or qualified in like manner.

Finally, the whole is subject to any express provisions of the special Act. (3) When a company is incorporated by a special Act, and there are provisions in the special Act as well as in the general Act on the same subject which are inconsistent; if the special Act gives in itself a complete rule on the subject, it would seem that the expression of that rule amounts to an exception of the subject matter of the rule out of the general Act. But when the rule given by the special Act applies only to a portion

(1) 21 O. R. 632.

(2) See C. S. C., ch. 66, sec. 83; schedule B, p. 1227. In the revision of 1886, C. S. C., ch. 66, was preserved, nor was it repealed by the Act of 1888, *Zimmer v. G. T. R.*, 19 O. A. R. 695.

(3) Sec. 3, and see *R. St. Catharines & Niagara Central Ry. Co. v. Barbeau*, 15 O. R. 583.

of the subject, the special Act may apply to one portion and the general Act to the other. And the probable intention of the Legislature is important in considering such a question. (1)

6. Some doubt has arisen as to the interpretation of the phrase "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada," used in sec. 5 of the Act. In an Ontario case, (2) a company was incorporated by the Ontario Legislature, and by an Act of the Dominion Parliament the Governor-in-Council was authorized to grant a subsidy to the company; and by another Act of the Dominion Parliament, the company's railway was declared to be a work for the general advantage of Canada, and the company was authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion Parliament. It was held that the effect of the declaration, that the work was a work for the general advantage of Canada, was to bring it under the exclusive legislative authority of the Parliament of Canada, but that the Acts of the Ontario Legislature previously passed were in no way affected, that the railway in question was not one "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada," (3) and therefore the secs. 4 to 39 of R. S. C. 109 (corresponding to secs. 32 to 89 of the present Act) did not apply to it. (4)

7. As affecting the controversy as to the position of Provincial legislation with regard to railways subsequently coming under the Federal jurisdiction, it should be noted that provision is made in section 308, whereby the Governor General may, by proclamation, confirm such legislation in force before the passing of The Railway Act, which then becomes as valid as if it had been enacted by the Parliament of Canada.

8. The practical effect of section 306, declaring the leading lines of railway to be works for the general advantage of Canada as well as all other lines connecting with or crossing such lines, is to bring, with few exceptions, most of the railways in Canada

(1) Ontario & Sault Ste. Marie Railway Co. v. The Can. Pac. Ry. Co., 14 O. R. 432, and cases there cited.

(2) Re St. Catharines & Niagara Central Ry. Co. v. Barbeau, 15 O. R. 583.

(3) R. S. C., cap. 109, s. 3.

(4) See also Toronto Belt Line v. Lauder, 19 O. R. 607, and cases there cited.

under Federal jurisdiction, and, for financial reasons, it is now found advisable to obtain charters from the Dominion Parliament rather than from the Provincial Legislatures.

CHAPTER II.

ORGANIZATION AND MANAGEMENT OF RAILWAY COMPANIES.

INCORPORATION—OFFICES OF COMPANY—PROVISIONAL DIRECTORS AND THEIR POWERS—CAPITAL, ETC.

1. *Powers vested in corporations.*
2. *Limit of shareholders' liability.*
3. *Offices of the company.*
4. *Provisional directors and their powers.*
5. *Moneys deposited to be withdrawn for certain purposes only.*
6. *Allocation of stock.*
7. *Capital stock and shares.*
8. *Application thereof.*
9. *First meeting of shareholders.*
10. *Notice thereof.*
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12. *How capital may be increased.*
13. *Votes of shareholders.*
14. *Who may hold stock in a railway company.*

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15. *Annual meetings and special meetings.*
16. *Proof of proceedings at meetings.*
17. *Presumptions.*
18. *Interference of Court.*
19. *Special and general meetings.*
20. *Adjourned meeting.*
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DIRECTORS.

22. *Election of.*
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26. *President.*
27. *Meetings of directors, notice of.*
28. *Voting.*
29. *Directors subject to shareholders and by-laws.*
30. *Disability of officers, contractors and sureties.*
31. *Powers of directors.*
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33. *Liability of.*
34. *Liability of company and directors.*
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36. *Liability of company for reports of directors.*

OFFICERS AND AGENTS.

37. *General manager or superintendent and other officers.*
38. *Libel.*
39. *Manslaughter.*
40. *Conductors.*
41. *Station agents.*
42. *Contractors.*
43. *Agents generally.*
44. *Acquiescence, ratification.*
45. *Notice.*

1. Section 31 of The Railway Act provides that every company incorporated under special Act shall be a body corporate, vested with such corporate powers, privileges and immunities as Powers vested in corporations.

are necessary to carry into effect the intention and objects of the Act and the special Act, and which are incident to such corporation or are expressed or included in The Interpretation Act.

According to The Interpretation Act, (1) corporations have power to sue and be sued, contract and be contracted with by their corporate name, to have a common seal, and to alter or change the same at their pleasure, and to have perpetual succession and hold personal property or moveables for the purposes for which the corporation is constituted, and to alienate the same at pleasure; and there shall also rest in any majority of the members of the corporation the power to bind the others by their acts, and the individual members of the corporation are exempted from personal liability for its debts or obligations or acts, provided they do not violate the provision of The Act incorporating them.

Limit of
shareholders'
liability.

2. The liability of a shareholder toward the creditors of the company is limited by section 86 of the Act, to an amount equal to the amount unpaid on the stock held by him, and until the whole amount of his stock has been paid up; but such liability does not arise until an action has first been taken by the creditors against the company, and, execution having issued, is returned unsatisfied in whole or in part.

Offices of the
company.

3. The special Act incorporating a railway company specifies where the head office (2) shall be situated; but the Board of Directors may establish one or more offices in any other places in Canada or elsewhere, (3) but the domicile or residence of the company remains at the place fixed by its charter as the site of its head office. (4)

(1) R. S. C., ch. 1, sec. 7, No. 43.

(2) In *Welch v. Baker* (21 L. C. J. 97, 1876), it was held that in an action against a shareholder to recover the amount unpaid on his shares, the cause of action arose at Montreal, where the company had its principal office, and where judgment was rendered for the debt due by the company, and execution was also issued, and not at Bedford, where the shareholder subscribed for his shares.

(3) Sec. 32.

(4) A railway company being a corporation can only have one residence, and that its head office. A railway company which has its head office out of the Province of Quebec must give security for costs. *Canada Atlantic Ry. Co. v. Stanton*, 11 L. N. 388 (1888), M. L. R., 4 S.C. 160.

4. The special Act names the persons who are incorporated Provisional directors and their powers. as a company, and appoints certain of them as provisional directors, of whom the majority form a quorum, and these provisional directors hold office until the first election of directors, and they open stock-books and procure subscriptions of stock and receive payments on account of subscriptions.

5. Such payments are deposited by them in a bank, and these monies cannot be withdrawn, except for the purposes of the railway, or upon the dissolution of the company, for any cause whatsoever. They also cause plans or surveys of the road to be made, and they allot and apportion the stock among the subscribers. (1)

6. If more than the whole stock has been subscribed, they allocate and apportion the authorized stock among the subscribers, as they deem most advantageous and conducive to the furtherance of the undertaking. (2)

7. The capital stock of the company, the amount of which shall be stated in the special Act, shall be divided into shares of one hundred dollars each; Capital stock and shares.

8. And the money so raised shall be applied, in the first place, to the payment of all fees, expenses and disbursements for procuring the passing of the special Act and for making the surveys, plans and estimates of the works authorized by the special Act, and all the remainder of such money shall be applied to the making, equipping and completing and maintaining of the said railway and other purposes of the undertaking. (3)

9. As soon as twenty-five per cent. of the capital has been subscribed, and ten per cent. of the amount subscribed paid up, they call a meeting of the shareholders at the head office of the company, First meeting of shareholders.

10. Giving four weeks notice of the meeting by advertisement in the *Canada Gazette*, and in a local newspaper at the place where the head office is situated. Notice thereof.

11. At this first meeting, the shareholders who are qualified elect the number of directors fixed by the special Act. (4) Election of directors.

(1) Sec. 33.

(2) Sec. 34.

(3) Sec. 35.

(4) Sec. 36.

How capital
may be
increased.

12. The original stock of the company may be increased, (1) with the approval of the Governor-in-Council from time to time, to any amount, provided that the increase is authorized by a vote of the shareholders who hold at least two-thirds of the subscribed stock, at a meeting called for the purpose after special notice as required by the Act. (2)

Votes of share-
holders.

13. Each shareholder, as in other corporations, has a vote for

(1) Where there is evidence that the original nominal capital was never paid in, the directors have no power to increase the stock of the company, and as the stock held by the defendant consisted wholly of new unauthorized stock, the plaintiffs, execution creditors of the company, whose writ had been returned unsatisfied, could not recover by instituting proceedings by way of *scire facias* against the defendant as holder of shares not fully paid up. Page *v. Austin*, 10 S. C. R. 132.

The directors of an incorporated company, even when the Act authorizes an increase of capital, have not the right to order such increase, if it be proved that there are sufficient funds in hand, all debts paid, and if such increase be ordered simply to secure to the directors the control of the affairs of the company. *Perrault v. Milot*, 12 Q. L. R. 248, Q. B.

Held, affirming the decision of C. P. Div., *Burton, J. A.*, diss: That the duty of the Provincial Secretary in Ontario in issuing the notice of the increase of the capital stock in an incorporated company, required to be given under 27 Vic., c. 23, s. 5, ss. 18, is merely ministerial, and that the requirements of the Act being complied with, he has not any discretion in the matter, but must issue the notice.

Held, also, that the power conferred of increasing the capital stock by sub-secs. 16, 17 and 18 of sec. 5, is a general power not limited to a single occasion; and Held, that there is nothing in the Act which makes a prior subscription and payment of the new stock, or a part of it, a requisite to the right of the company to have the notice published. *In re the Massy Mfg. Co.*, 13 O. A. R. 446 (Court of Appeals). A company was incorporated under 27-28 Vic., cap. 23, with power to increase by by-law the capital stock of the company so soon as, but not before, the capital was all allotted and paid up. The plaintiffs, execution creditors of the company, whose writ had been returned unsatisfied, intended proceedings by way of *scire facias* against the defendant as holder of shares of the new increased capital stock.

Held, reversing judgment of the Court below, that the by-law passed by the company being *ultra vires*, the alleged shares of the defendant had not any existence in law, and therefore that the plaintiffs failed to establish that the defendant was a shareholder within the Statute, and consequently they were not entitled to recover. Page *et al. v. Austin*, 7 O. A. R. 1.

(2) Sec. 37.

each share held by him, (1) upon which all calls or amounts due on the stock have been paid up, (2) and at least ten per cent. must be paid up to qualify him. (3) Shareholders may, as in other corporations, vote, not only in person but by proxy—that is, by an authority or power of attorney given in the form or to the effect prescribed by the Act to any other person to vote for him at any meeting of the shareholders. (4) The Act does not require, as in the case of most corporations and as required by some special Acts, that the person representing the shareholder should himself be a shareholder.

14. As to who may hold stock in a railway company, all individuals of course may do so, and it is provided by the Act that municipal corporations, provided they are empowered to do so by the laws of their Province, may also hold stock. (5)

Who may hold stock in a railway company.

Under the statutory law of this country, corporations and joint stock companies, generally, cannot hold stock in a railway company, unless specially authorized to do so by their charter; (6) nor can any railway company, with certain named

(1) Where an election of directors in a joint stock company was clearly illegal, the voters having been allowed only one vote, whereas each share should have given a vote, but the parties had for more than eight months discharged the duties, the Court refused to interfere by *mandamus* for a new election.

Quare, whether *mandamus* or *quo warranto* would be the proper remedy. *Moore v. Port Bruce Harbour Co.*, 14 U. C. Q. B. 365.

In determining an application of a shareholder for an injunction, the Court will look to the circumstances of the case, and adopt the course which is most to the advantage of the whole body of shareholders. So where a shareholder asked for an interim order to restrain persons from voting on certain shares, and it appeared that the shares had been held by the defendants for more than a year, the injunction was refused, more especially so as the petitioner had a remedy by *quo warranto* if he were wronged by an illegal vote. *Gilman v. Robertson et al.*, 7 L. N. 60.

(2) Sec. 43.

(3) Sec. 36.

(4) Sec. 44.

The powers of attorney in the hands of the shareholders were deposited before the meeting with the secretary, who verified them and granted certificates. Held sufficient without verification of proxies during the meeting. *Gilman v. Robertson and Royal Canadian Ins. Co.*, M. L. R., 1 S. C. 5.

(5) Sec. 38.—The obligation of a municipality to issue debentures in payment of a subscription of shares is not to be regarded as equivalent to a mere obligation to pay money; in which case, by C. C. 1077, the damage resulting from delay would consist only of interest from the day of default. *La Corp de la Cie. d'Ottawa v. The Q. M. O. & O. Ry. Co.*, 26 L. C. J. 148, S. C.; M. L. R., 1 Q. B. 46; confirmed in Supreme Court, 14 S. C. R. 193.

(6) The Companies Act, 1886, 2 R. S. C., ch. 119, sec. 93.

exceptions, purchase its own stock or acquire of the stock, bonds or securities of any other railway company in Canada, unless specially authorized to do so by its special Act. (1) And the directors are subject to heavy penalties for knowingly permitting the funds of the company to be applied in violation of this prohibition. (2)

Corporate Meetings.

Annual meetings and special meetings. **15.** The Act provides for an annual meeting for the election of directors and the transaction of general business, also special meetings to be called by the directors, or upon their failure for 21 days after request to do so, by shareholders representing at least one-fourth in value of the subscribed stock. (3) And all general meetings, whether annual or special, shall be held at the head office of the company. (4) Four weeks notice is required to be given of all meetings by advertisements published weekly in the *Canada Gazette* and a local newspaper. (5)

No special meeting can enter upon any business not set forth in the notice upon which it is convened. (6) At annual meetings any business incident to the undertaking may be transacted, provided it is not such business as is required by the Act or the company's charter to be transacted at a special meeting. (7)

Proof of proceedings at meetings. **16.** By section 45, it is enacted that all matters or things proposed or considered at any meeting of the shareholders shall be determined by the majority of votes and proxies then present and given; and all decisions and acts of any such majority bind the company and are deemed the decisions and acts of the company. Also by section 54, the acts of the majority of a

(1) Sec. 276, see *Ross v. Fiset*, 8 Q. L. R. 251. (2) Sec. 277.

(3) The calling of an annual meeting of a railway company is not a duty specially appertaining to the office of president, *The Railway Act*, 42 Vic., cap. 9, making it the duty of the directors to call such meeting to be held; and held, that when directors neglect or omit to perform such duty of calling the meeting, the condemnation under C. C. P. 125, for failure to comply, will be against the corporation and not against the directors personally. *Hatton v. M. P. & B. Ry. Co., M. L. R., 1 S. C. 69* (1884).

(4) Sec. 40.

(5) Sec. 41. *Milot v. Perrault*, 12 Q. L. R. 193.

(6) An individual shareholder in a railway company will not be entitled to an injunction forbidding a special meeting of the company for the purpose of sanctioning a lease of the road to another railway, until a meeting has been called at which the accounts of the company have been submitted, unless fraud by the majority, or corrupt influence have been proved. (*Angus v. M. P. & B. Ry. Co.*, 2 L. N. 203, 23 L. C. J. 161 (1878).

(7) Sec. 42.

quorum of directors are binding. (1) The power of a majority of the shareholders of a company incorporated by Act of Parliament is limited only by that act, unless the powers of the majority are specially restricted in some other way. (2) By section 212, copies of minutes of proceedings and resolutions at any such meetings shall be evidence of such proceedings and resolutions in any court, when certified to by the secretary as being true copies extracted from the minute book. (3)

17. It is well settled that when a board of directors of a corporation, formed for pecuniary profit, orders an act to be done, and the act is subsequently performed, its legality cannot afterwards be questioned by any stockholder or director, on account of the irregularity of the meeting, if he made no objection at the time, or afterwards when he had an opportunity to do so. (4)

18. The Court is very reluctant to interfere with the holding of meetings of shareholders, especially when they are called for the purpose of investigating and controlling the conduct of the managing body; and the Court will not interfere to restrain such a meeting simply because the notice convening it is badly framed, and invites the meeting *inter alia* to pass resolutions which would be invalid if passed; for the meeting might take some other legal course, *e.g.*, pass some amended resolution which would be valid. (5)

19. Apart from the business which is required, by The Railway Act or the special Act, to be transacted at a special meeting, one and the same meeting may be both general and special: general for the purpose of transacting the usual business of the company, and special for the transaction of some particular business, of which special notice may have been given. (6)

(1) Where the quorum of directors of a railway company was fixed at three, by a special statutory provision, and the company was subsequently amalgamated with another company, and it was provided by the Act of amalgamation that the board of directors of the amalgamated company should not be less than five nor more than seven directors (without expressly changing or regulating the quorum), the original provision making three directors a quorum continued in force. *Fairbanks v. O'Halloran*, M. L. R., 4 Q. B. 163 (1888).

(2) *Lindley Comp.* 315.

(3) As to proof of calls, see page 64 *infra*, Note 7.

(4) *Wood Railway Law*, 341.

(5) *Lindley Comp.* 304. See also *Angus v. M. P. & B. Ry. Co.*, 2 L. N. 203; 23 L. C. J. 161 (1878); *Gilman v. Robertson et al.*, 7 L. N. 60; page 15 *supra*; *Murphy v. La Cie.*, etc., 16 L. C. R. 300.

(6) *Lindley Comp.* 308.

Adjourned
meeting.

20. It is a general rule that corporate meetings may be adjourned; and if a corporate meeting is regularly called, any business that might have been lawfully transacted at the original meeting may also be done at the adjourned meeting. But no other business can legally be done at an adjourned meeting without special notice. (1)

Irregular
meetings.

21. When by the general or special Act provision is made for the holding of annual meetings at a particular time, as the first Monday in January, etc., it is treated as directory merely; and if held at any another time, although irregular, it does not render the elections void, and the directors elected at such meeting can bind the corporation by their acts. (2)

If votes are cast for a candidate who is ineligible for the office of director, they will not be thrown away, so as to elect a candidate having a minority of votes, unless the electors casting such votes had knowledge of the fact on which the disqualification of the candidate for whom they voted rested, and also knew that the latter was for that reason disabled by law from holding the office. (3)

Directors.

Election of.

22. Section 36 provides for the first election of directors; section 46, for the annual election. A day is mentioned in the special Act, for the election of directors; but if such election is not held on the day appointed therefor, the directors shall cause such election to be held at a special meeting duly called for that purpose, within as short a delay as possible after the day so appointed. (4) No person shall vote on such subsequent day except those who would have been entitled to vote if the meeting had been held on the day when it should have been held. (5)

When the annual meeting did not take place on the day ap-

(1) Wood Railway Law 341, and note 6 Lindley Comp. 341.

(2) Wood Railway Law 349.

(3) Reg. v. Coaks, 3 E. & B. 248; Regina v. Tewkesbury, L. R., 3 Q. B. 628; Drinkwater v. Deakin, L. R., 9 C. P. 626; Etherington v. Wilson, L. R., 20 Eq. 606.

(4) Sec. 46.

(5) Sec. 47. The Court of Chancery has jurisdiction to set aside an election of directors by persons who are subscribers nominally and not *bona fide*. Davidson v. Grange, 4 Grant's Chy. 377.

A suit to set aside an election of directors of a corporation, on the alleged ground of fraud, may be brought by some of the shareholders on behalf of all, and need not be in the name of the corporation itself. *Ib.*

pointed, in consequence of an injunction suspending the holding of such meeting, the injunction being subsequently dissolved, it was held, that service of notice upon the president and secretary that the injunction had been dissolved, together with a copy of the judgment dissolving the injunction, was sufficient to put the company into default to call the meeting, and a mandamus might issue in the name of a shareholder under article 1022 of the Quebec Code of Civil Procedure to compel the company to call the meeting. (1)

23. A person who is ineligible to the office of director, or whose election was irregular, cannot be a director *de jure*, yet he does by his election become a director *de facto*, if he enters upon the discharge of his duties. Persons dealing with directors irregularly elected, without notice of irregularity, and in good faith, are entitled to treat them as the agents of the company, and to hold the company bound by their acts, as if they were duly appointed directors. (2) But as between such directors and the shareholders, the irregularity is of greater importance, and it has been held that persons *de facto*, but not *de jure*, directors cannot allot shares, make valid calls or forfeit shares. (3)

24. No person shall be a director unless he is a shareholder owning twenty shares of stock absolutely in his own right, and has paid all calls due thereon, and is qualified to vote for directors at the election at which he is chosen. (4)

It was held in an English case where the qualification shares were to be held by the directors in their own right, that beneficial ownership was not necessary for such qualification, as where the shares were mortgaged. (5) But the emphatic word "*absolutely*" used in the above section would seem to exclude an interpretation in the sense of this case under our Act.

In addition to the directors elected by the shareholders, the mayor, reeve, or chief officer, etc., of any municipal corporation, holding \$20,000 of stock in the company, is *ex officio* a director, unless special provision for the representation of such corporation is made by special Act. (6)

(1) *Hatton v. Montreal, Portland & Boston Ry. Co.*, M. L. R., 1 S. C. 69.

(2) *Lindley Comp.* 300.

(3) *Ibid.*

(4) *Sec.* 49.

(5) *Pulbrook v. Richmond Consol. Mining Co.*, 9 Ch. D. 610.

(6) *Sec.* 58; vide also R. S. Q. 5138, and Appendix, sec. 38.

Vacancies.

25. In case of death, absence or resignation of any of the directors, others may, unless otherwise prescribed by the by-laws, be appointed in their stead by the surviving directors; but if such appointment is not made, such death, absence or resignation shall not invalidate the acts of the remaining directors. (1)

A director who becomes bankrupt or ceases to attend to his duties does not thereby necessarily vacate his office. (2) But if the number of continuing members is less than a quorum, which section 53 renders requisite for the transaction of any business, they cannot fill up a vacancy, which must remain until the next annual meeting, (3) as provided by section 40. The by-laws may, however, prescribe the manner in which vacancies in the directorate shall be filled, but the by-laws will have no force until sanctioned by the Governor-in-Council. (4) The directors appointed remain in office till the next ensuing election. (5)

President.

26. The directors shall, at their first or at some other meeting after the election, elect one of their members to be president of the company, who shall always, when present, be the chairman of and preside at all meetings of the directors, and shall hold his office until he ceases to be a director, or until another president has been elected in his stead; and they may, in like manner, elect a vice-president, who shall act as chairman in the absence of the president. (6)

Without special authority the president possesses such powers as, by usage and necessity, are incident to his office and the usual course of business. (7) Section 60 of The Railway Act enumerates some of his powers, such as the signing of notes, bills and debentures, and other instruments, and the performing of all acts which, by the regulations and by-laws of the company, or by the special Act, are required to be signed, performed and done by the president. In the case of his absence, these

(1) Sec. 51.

(2) *Phelps v. Lyle*, 10 A. & E. 113; and see *Wilson v. Wilson*, 6 Scott 540.

(3) *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350.

(4) Secs. 48 & 217. (5) Sec. 50.

(6) Sec. 52.

(7) See *Hatton v. M. P. & B. Ry. Co.*, M. L. R., 1 S. C. 69.

acts can be performed by the vice-president. (1) But unless the charter, by-laws, or the board of directors, by resolution, confer such authority upon him, he has, as president, no more authority to bind the corporation by contracts than any other director has. (2) Where the president or other officer of a corporation assumes to do certain acts for it, for which there is no express authority, if the corporation ratifies such acts either expressly or impliedly, and they are within the scope of its authority, it is bound thereby. (3)

27. When directors have stated meetings, either by virtue of the charter, by-laws or resolution of the Board—as on the first Monday in each month, etc., no notice of such meetings is re-

Meetings of directors, notice of.

(1) Sec. 60.

(2) Wood Rys., 436, 437.

The president, or other principal officer of a corporation, taking a mortgage for and in the name of the corporation, does not act as its agent, but as principal in the exercise of its corporate power, and may therefore make the affidavit of *bona fides* under C. S. U. C., cap. 45, without authority in writing. Bank of Toronto v. McDougall, 15 U. C. C. P. 475; and see MacMurrick v. Bond Head Harbour Co., 9 U. C. Q. B. 333.

(3) So where J. H. B., a director of defendant's company, personally owned a vessel, "The United Empire," valued by him at \$150,000, and was possessed of a majority of the shares of the company, some of which he had assigned to others of the defendants in such numbers as qualified them for the position of directors of the company. Upon a proposed sale and purchase by the company of the vessel, the board of directors, including J. H. B., adopted resolution approving of the purchase; and subsequently at a general meeting of the shareholders, including J. H. B., and those to whom he had transferred portions of his stock, a like resolution was passed, the plaintiff alone dissenting; it was held, reversing the decision of the Ontario Court of Appeals (11 Ont. A. R. 205), that such by law was illegal, and could not be ratified by a resolution of the shareholders of the company at a meeting subsequently called for the purpose of such ratification, which resolution was passed by a small majority obtained by the votes of the interested director. The N. W. Transportation Co. v. Beatty, 12 S. C. R. 598. But in the Privy Council it was held that where a voidable contract, fair in its terms and within the powers of the company, had been entered into by one of the directors with one of their number as sole vendor, such director was entitled to exercise his voting power as a shareholder in general meeting to ratify such contract. His doing so could not be deemed oppressive by reason of his individually possessing a majority of votes acquired in a manner authorized by the constitution of the company. The N. W. Transportation Co. v. Beatty, 12 App. Cas. 589.

The head of a corporation may bind the corporation by any contract from which it may derive a benefit. Royal Instn. for Adv. of Learning v. Desrivieres, Stuart's Rep. 224, K. B.

Where a corporation has a knowledge of an act of its president and secretary which they had not sufficient authority to transact, and it does not repudiate such act, the corporation will be bound by it. Société de Constr. d'H. v. Soc. de Const. Metropolitaine, 4 Dorion Q. B. Rep. 199.

See also Jones v. E. T. Mut. Ins. Co., M. L. R., 3 S. C. 413; 11 L. N. 132.

quired, as they are all bound to take notice of the time and place of the holding thereof in the mode provided by the Act. (1)

Voting.

28. Each director has but one vote excepting the chairman, who in case of an equal division has a casting vote. (2)

Directors subject to shareholders and by-laws.

29. The directors are subject to the examination and control of the shareholders at their annual meetings, and are also subject to all by-laws of the company, and to the orders and directions from time to time made or given at the annual or special meetings, but such orders and directions must not be contrary to any express directions or provisions of the general or of the special Act. (3)

Disability of officers, contractors and sureties.

30. No person who holds any office, place or employment in, or who is concerned or interested in any contract under or with the company, or is surety for any contractor, is capable of being chosen a director, or of holding the office of director; nor may any person who is a director of the company enter into or be directly or indirectly, for his own use and benefit, interested in any contract with the company, other than a contract which relates to the purchase of land necessary for the railway, or be or become a partner of or surety for any contractor with the company. (4)

A. had been appointed secretary at a salary, and whilst secretary he was elected a director, and appointed upon a committee to exercise certain powers of the directors; from the time of his election he received salary as a committee man, but ceased to receive salary as secretary, though he continued to perform all the duties of the office. It was held that A. did not hold an *office* under the company, so as to disqualify him from being party as a director to the making of a call. (5)

With regard to the nature of the contracts which disqualify a person interested in them from being a director, it has been held that they must be contracts made with the company in the prosecution of its undertaking, and that there is nothing to prevent a banker of a company from being one of its directors. (6)

(1) Warner v. Mower, 11 Vt. 385; Smith v. Darley, 2 H. L. Cas. 789. *In re* Brit. Sugar Ref. Co., 3 K. & J. 408.

(2) Sec. 55; as to quorum, see *supra* p. 20.

(3) Sec. 56.

(4) Sec. 57.

(5) Iron Ship Coating Co. v. Blunt, L. R., 3 C. P. 485.

(6) Lindley Comp. 328; Sheffield & Manchester Ry. Co. v. Woodcock, 7 M. & W. 574; and see Regina v. Gasharth, 5 Q. B. D. 321.

It has not yet been decided, when there is no express power granted the shareholders in the general or special Act to remove directors, whether there is an implied power to do so by resolution duly passed at a meeting properly convened for the purpose; but the better opinion seems to be that there is. (1) It has been held, however, that if a director is appointed for a definite period, he cannot be removed before that period has expired, without some special provision in the charter or by-laws. (2) Where the shareholders have power to remove a director for "any reasonable cause," the shareholders are themselves the judges as to what is, and what is not, a reasonable cause for removal; and their decision will not be interfered with if they act fairly and in good faith. (3) But when there had been a meeting where some who were not legally directors were present, and some who were legally directors were excluded, the Court interfered only to the extent of deciding that it was not a meeting which could discharge the duties of a board. (4)

31. The directors are required by section 53 of the Act to make by-laws for the stock, property, business and affairs of the company, and for the appointment of all officers and servants. Powers of directors.

Where the managing director of a railway company had issued a large number of debentures to other directors at a discount of 25 per cent. in satisfaction of their claims against the company, the plaintiffs, who had subsequently obtained debentures of the same class, contended that the said directors could only claim the amount actually advanced by them, and that they could not, as directors, sell the debentures to themselves at a discount; it was held that inasmuch as the company did not complain of the transaction, nor any shareholders, and inasmuch as the transaction was not *ultra vires*, it was not competent for the holders of the debentures, such as the plaintiff, were, to impugn the position of the said directors. (5) Where the directors

(1) Lindley Comp. 302.

(2) Lindley Comp. 302. Imperial Hydropathic Hotel Co. v. Hampson, 23 Ch. D. 1.

(3) Inderwick v. Snell, 2 McN. & G. 216.

(4) Harden v. Philipps, 23 Ch. D. 14.

(5) Bank of Toronto v. Cobourg, etc., Ry. Co., 10 Ont. R. 376. See Campbell's case, 4 Ch. D. 470.

of a company abuse their position so as to get an advantage at the expense of the company, it is for the corporation or its corporators to complain. (1) But it has been held that a stockholder can bring an action of account against a corporation, and thereby contest the validity of a by-law made by its board of directors. (2) The by-laws of a mutual insurance company gave the president the management of its concerns and funds, with power to act in his own discretion and judgment, in the absence of special directions from the directors; and it was also his duty to sign all notes authorized by the board or by virtue of the by-laws; and was also to act as secretary. Held, that the plaintiff, who was the transferee for value given before maturity of a note signed on behalf of the company, by the president as president and treasurer, and given to the payee in settlement of a valid claim against the company, was entitled to recover the amount of said note from the company. (3)

Their position
as trustees.

32. Directors are not only agents, but to a certain extent trustees. (4) It is their duty so to conduct the business of the company as to obtain for the benefit of the shareholders the greatest benefits that can be obtained consistently with the trust reposed in them by the shareholders, and with honesty to other people. (5) They are bound to account to the company for all profits made by themselves, by their employment of the assets of the company, and for all profits made by them at the expense of the company, unless they can show that the company, with a full knowledge of the facts, has agreed to allow them to retain such profits for their own benefit. (6)

Liability of.

33. Directors are responsible for the loss of the company's assets, if that loss is attributable to the employment of the assets in a manner and for purposes not warranted by the constitution

(1) *Ibid.*

(2) *Keys v. Quebec Fire Ins. Co.*, Stuart's Rep., 425 K. B.

(3) *Jones v. E.T. Mutual Ins. Co.*, M. L. R., 3 S.C. 413; 11 L. N. 132.

(4) *Faure Electric Accumulator Co.*, 40 Chy. D. 141; *Kay, J.*

(5) *Lindley Comp.* 364; and see *Faure Electric Accumulator Co.*, 40 Ch. D. 141; *York & Midland Ry. Co. v. Hudson*, 16 Beav. 485; *Great Luxembourg Ry. Co. v. Magnan*, 25 Beav. 586.

(6) *Lindley Comp.* 365; see also 16 Beav. 485 *supra*; *Parker v. McKenna*, 10 L. R. Ch. 96; *Gaskell v. Chambers*, 26 Beav. 360.

of the company. (1) Generally speaking, directors have a wide discretion; and although in the absence of proof of *mala fides*, it may be difficult to establish a case of culpable negligence, or wilful default, yet if such a case be proved, and loss by the company attributable thereto be also proved, the directors will be liable to make good such loss. (2)

But directors are not liable for errors of judgment or honest mistakes, when acting within their powers. (3) so much so that they have been held not liable for losses occasioned by purchasing a business which they knew to be insolvent at the time of the purchase. (4)

Directors must, however, attend to their duties, and not place undue reliance on other servants of the company. (5)

34. Directors who are actually implicated in misapplying the company's money are jointly and severally liable for the losses arising therefrom, and to entail such liability it is not always necessary that they should have taken an active part in such misapplication. (6)

Liability of company and directors.

As to how far the knowledge of his co-directors is the knowledge of a director, so as to render him liable for a breach of trust, is a question that can scarcely be considered as settled. (7) Mere constructive notice, however, is not enough to impose liability. (8)

35. Directors of companies are generally allowed compensation for their time and attention to the company's business by express agreement; but where there is no such agreement, they cannot, without the sanction of the shareholders, charge the company anything for their services. (9)

(1) See *Land Credit Co. of Ireland v. Lord Fernoy*, L. R., 8 Eq. 7; *Grimes v. Harrison*, 26 Beav. 435; *In re. Nat. Funds Assur. Co.*, 10 Ch. D. 118; *Fritchcroft's case*, 21 Ch. D. 519; *In re. Denham & Co.*, 25 Ch. D. 752; *Leeds Estate etc. Co. v. Shepherd*, 36 Ch. D. 787.

(2) *Lindley Comp.* 372; *Charitable Corp. v. Sutton*, 2 Atk. 400; *Overend, Gurney & Co. v. Gibb*, L. R., 5 H. L. 480; *Evans v. Coventry*, 2 Jur. N.S. 557; *Turquand v. Marshall*, 4 Ch. 376.

(3) *London Financial Association v. Kelk*, 26 Ch. D. 107 and 144. (4) *Overend, Gurney & Co. v. Gibb*, L. R., 5 H. L. 480; and see *Parker v. Lewis*, 8 Ch. 1035, as to compromising claims.

(5) *Leeds Estate Co. v. Shepherd*, 36 Ch. D. 787.

(6) *Land Credit Co. v. Lord Fernoy*, L. R., 8 Eq. 7; L. R., 5 Ch. 763.

(7) *Joint Stock Discount Co. v. Brown*, L. R., 8 Eq. 381; *Ashurst v. Mason*, L. R., 20 Eq. 225; *Land Credit Co. v. Lord Fernoy*, 8 Eq. 7; *Turquand v. Marshall*, 4 Ch. 385.

(8) *Hallmark's case*, 9 Ch. D. 329.

(9) *Dunstan v. Imperial Gas Co.*, 3 B. & Ad. 125; *Lindley Comp.* 388.

Liability for
reports of
directors.

36. Section 62 provides that directors shall cause annual statements to be prepared, showing monies received by the company or by the directors or managers, for the use of the company, and all charges and expenses attending the erecting, making, supporting, maintaining and carrying on of the undertaking and all other receipts and expenditures of the company or the directors.

The reports made and accounts rendered by the directors in the course of their duty, though made and issued to the shareholders only, as to the state of the affairs of the company, are considered the representations of the company, not only to the shareholders, but to the public, if they are published and circulated by the authority of the directors or a general meeting. (1)

Directors of a company are personally liable for injury caused to third parties by the false representations contained in a report of the directors to the shareholders; but the injury must be the immediate and not the remote consequence of the representation, and it must appear that the false representation was made with the intent that it should be acted upon by such third person. (2) A shareholder cannot claim damages against directors for having been induced to purchase shares, by misrepresentation, if he has continued to hold them without objection long after he had knowledge, or full means of knowledge, of the untruth of the representations on which he bought them. (3)

Officers and Agents.

General manager or superintendent and other officers.

37. Where the powers and duties of a general manager or superintendent are not defined, his authority is to be measured by usage, and what he has been permitted to do by the corporation, and the incidents thereof. (4) If it is shown that upon several occasions, as well before as after the act with which it is sought to charge the corporation, he performed similar acts with the approval of the corporation, it is sufficient to establish his authority to do the act in question; and both his appointment

(1) Rhodes v. Starnes, 22 L. C. J. 113.

(2) *Ib.*

(3) *Ib.*

(4) Wood Ry. Law 440. As to managing director, see Canada Central Ry. Co. v. Murray, 8 S. C. R. 314.

and authority may be inferred from his open and approved acts.

(1) The powers of a general superintendent of a railway company are necessarily extensive; and may be said generally, in the absence of express limitation, to clothe him with authority to act for the company in all ordinary matters connected with the management and operation of the road. In each particular his powers must be determined by the facts proven, applying the tests above mentioned. (2) A few instances may, however, be given in illustration. (3)

In England it has been held that the general manager or superintendent of a railway has, as incident to his employment, authority to bind the company to pay for surgical attendance bestowed at his request upon a servant of the company, injured by an accident upon its railway. (4)

It is not competent for the officers of a company, in order to avert a seizure of a quantity of iron rails, to sign a letter to a bank making the seizure, agreeing that the bank, out of monies coming to their hands from certain garnishee proceedings taken by the bank, against debtors of the company, might retain "an amount sufficient to fully cover all your solicitor's costs, charges, and expenses against you, or against you and us, as between attorney and client, or otherwise; as well as the costs, charges and expenses of your bank, of what nature or kind soever, and after the payment of such, in the second place, to hold the surplus, if any, to apply on your executions against us." (5) But it is competent for the officers of a company to arrange that such bank should proceed to garnish certain debts due the company, the costs of which as between attorney and client the railway company were to pay. (6) The secretary and accountant have no power to accept drafts on behalf of the company, and conse-

(1) Wood Ry. Law 441.

(2) Canada Central Ry. Co. v. Murray, 8 S. C. R. 313.

(3) Unlawful acts of the managing director of a company destined to bring about the ruin of a co-partnership firm do not bind the company or make it responsible for damages unless approved or ratified by the company. Bury v. Corriveau Silk Mills, M. L. R., 3 S. C. 218.

(4) Walker v. Great Western Ry. Co., L. R., 2 Exch. 228; also in United States, Toledo, etc., Ry. Co. v. Rodriguez, 47 Ill. 188; Pacific R.R. Co. v. Thomas, 19 Kan. 256.

(5) Hamilton & Port Dover Ry. Co. v. The Gore Bank, 20 Grant Chy. 190.

(6) Ib.

quently the monies covered by such drafts may be legally attached by garnishment, notwithstanding such acceptance by such unauthorized officers. (1)

Libel.

38. Railway companies are liable for libels published by their general managers. (2) But where the general manager of a railway dismissed a conductor, and caused placards, describing his offence and dismissal, to be posted up in the company's private offices (in some of which they were seen by strangers), and entered in the circular books of the conductors, for the information and warning of the company's employees, 2000 in number, the communication to the employees was held to be privileged. (3)

Manslaughter.

39. Where the company's charter or the general Act obliges it to perform some duty requisite for the safe working of the road, and the general manager, having been warned of danger which might arise at a certain point, promises to carry out the requirements of the law, but neglects to do so, whereby an accident occurs at that point, he could be indicted for manslaughter; but where he promised to do that which was not required by the charter or general Act, and neglected to carry out his promise, in the event of a death resulting from his negligence, he could not be so indicted. (4)

There can be no doubt that an engine driver may be indicted for manslaughter for causing the death of anyone by omitting to take any of the usual precautions in driving his engine. (5)

Conductors
and employees

40. As a conductor is invested with authority to control all the movements of the train, and is bound to look out for the safety and reasonable comfort of the passengers, exigencies may arise, in which, by virtue of his position, he may make contracts which would be binding upon the corporation, where they become indispensably necessary for the performance of his duties. (6)

As to the liability of railway companies for the acts of their

(1) *Ryan v. M. & C. Ry. Co.*, 4 L. C. J. 38, Q. B., 1859.

(2) *Tench v. Great Western Ry. Co.*, 33 U. C. Q. B. 8; *Brown v. Le Maire*, etc., de Montréal, 17 L. C. J. 46; Art. 356 C. C.

(3) *Tench v. Great Western Ry. Co.*, 33 U. C. Q. B. 8.

(4) *Ex parte G. T. R.*, *Ex parte Brydges*, 18 L. C. J. 141, Q. B., 1874.

(5) *Ib.*, p. 147.

(6) *Wood Rys.* 449.

employees, there is a strong tendency, especially in the United States, to restrict the theory that masters are not liable for the tortious acts of their servants done beyond the scope of their authority; and railway companies have been held liable, where a conductor exacts illegal fare from a passenger, (1) or gives a passenger, who pays his fare to him, counterfeit, illegal or worthless money in making change, (2) or for an assault upon a passenger. (3) And the Quebec courts seem to hold the same view of the question. (4)

41. It has been held, however, by the Supreme Court (5) that the act of a station agent in issuing a false and fraudulent receipt for goods never delivered to the company was not an act done within the scope of his authority, and the company were, therefore, not liable for the money advanced thereon. And it was so held in a previous Ontario case. (6) But it has been held in New York State in the case of *Armour v. Michigan Ry. Co.*, (7) over-ruling a prior decision, that if a station agent gives a bill of lading of goods before they are received, the company is liable for money advanced thereon. In a Maryland case, however, it was held that the company might show that the agent signed the bill fraudulently, and that the goods were never received by it. (8) In this country, however, it may be said that the question is determined by the recent statute, 52 Vic. cap. 30, which, in providing for the liability of the agent in such cases, would appear to impliedly exclude the liability of the company.

In an action in trover for conversion of cattle killed in an accident and sold by the station master, it was held that the company were not liable, the sale not being the ordinary duty of the station master. (9)

The company will not be held responsible for freight delivered

(1) *Porter v. New York Central R.R. Co.*, 34 Barb. (N.Y.) 353.

(2) *Conn. v. Ohio, etc., R.R. Co.*, 1 Grant's Cas. (Penn.) 329.

(3) *Ramsden v. Boston & Albany R.R. Co.*, 104 Mass. 117.

(4) *Hill v. M. S. Ry. Co.*, S. C. in Review, Montreal 30 June, 1891; and see *Hogan v. Dorion*, 2 Q. B. R. 238; *Lavolette v. Thomas*, 31 L. C. J. 197; *Guénette v. City of Montreal*, M. L. R. 4 S. C. 69.

(5) *Erb v. The Great Western Railway Co.*, 5 S. C. R. 179.

(6) *Oliver v. The Great Western Ry. Co.*, 28 U. C. C. P. 143.

(7) 65 N. Y. 111.

(8) *Baltimore, etc., R.R. Co. v. Wilkens*, 44 Md. 11.

(9) *O'Rourke v. The Great Western Ry. Co.*, 23 U. C. Q. B. 427.

to one in their employ, but who was not their authorized agent for receiving freight. Thus in *Griffin v. The Great Western Railway Co.*, (1) where a witness swore that he had taken the plaintiff's mare to the station, where a man assisted him to put it into a car, in doing which the accident happened, it was held that there was no proof of delivery to defendants. And in a Manitoba case, (2) plaintiff sent by another person, S., a box of goods to defendant's station to be carried. S. saw several men working at defendant's freight shed, and told one of them he had brought a box for plaintiff; the man told him "to bring it in and put it there," and S. put it where he was told. He got no receipt. The box was lost. Plaintiff then went to the station at W., and saw the man already referred to, who admitted that he got the box, but could not say what he had done with it; held, that the admission of the man whom plaintiff saw was not admissible as evidence against the defendants, and as it was the only evidence of delivery, the plaintiff should be non-suited. (3)

Station agents must, from necessity, and from the usual course of business, be treated as the representatives of the corporation at their respective stations, in the absence of notice to the public of any special limitations upon their authority. Being authorized to receive, receipt for, and bill goods for shipment, the public has a right to presume that they have authority to bind the corporation by contracts relating thereto.

Thus an agent can by verbal contract agree to carry petroleum in covered cars, with despatch, although he had private instructions not to do so. (4)

Contractors.

42. The principle is now well established, both in England and the United States, although after a long course of conflicting decisions in both countries, that the employer of a "contractor" is not responsible for the negligence of the contractor or his servants, where the work contracted to be done is not of itself wrongful or dangerous, or there is no duty incumbent on the employer to do the thing himself. (5)

(1) 15 U. C. Q. B. 507.

(2) *Young v. C. P. R.*, 1 Man. 205.

(3) See also *Leigh v. Smith*, 1 C. & P. 638; *Slim v. The Great Northern Ry. Co.*, 14 C. B. 647.

(4) *Grand Trunk Ry. v. Fitzgerald*, 5 S. C. R. 204.

(5) *Smith on Negligence* (Amer. Edit. by Whittaker, 1889), p. 171-2; Wood, Ry. Law, p. 1008, sec. 284.

And the rule is the same in the civil law. (1) But this rule becomes difficult of application, where the employer of the contractor interferes with or exercises control over the latter in the manner of performing the work.

Where a railway acted as bankers for the contractors, and paid the wages of the workmen, cost of transport to the place where they were engaged, etc., it was held that the company were the real principals. (2) Plaintiff was a servant in the employment of one K., a contractor with defendants for keeping their road in repair. In performing these repairs, certain carriages and engines, under the management of the defendant's servants, were used to transport materials and convey workmen employed by K. The plaintiff being one of such workmen, became a passenger in one of these carriages to be carried from his place of work to his residence, and in this capacity was injured by a collision. Held, that defendants were liable. (3) This decision would appear at first sight to be contrary to later decisions; (4) but as pointed out in *Graham v. Toronto, Grey & Bruce Ry. Co.*, (5) that case differed very materially from these, for there it was admitted that in preparing the work necessary for the repairs, certain carriages and engines, under the guidance and management of defendant's servants, were used for the transport of materials and conveyance of the workmen employed by the contractor. In the latter cases it was found that the contract was to carry materials only, and not passengers, and the conductor, in permitting the plaintiffs to get upon the train, was not acting as defendant's agent.

A railway company is not responsible for damages occasioned by the negligence of contractors in making the road, where such damage was occasioned by doing acts which they were not required by their contract to do. (6) Nor for illegal acts of contractors, such as trespass or damage upon adjoining lands. (7)

(1) *Sourdat*, vol. 2, No. 892 et seq.; *Morin v. Atlantic & North-West Ry. Co.*, 12 L. N. 89; *Thibodeau v. City Pass. Ry. Co.*, 4 R. L. 654.

(2) *Lapointe v. C. P. R.*, 7 L. N. 29.

(3) *Torpy v. The G. T. R.*, 20 U. C. Q. B. 446.

(4) *Sherman v. Toronto, Grey & Bruce Ry. Co.*, 34 U. C. Q. B. 451; *Graham v. Toronto, Grey & Bruce Ry. Co.*, 23 U. C. C. P. 541; *Cunningham v. G. T. R.*, 31 U. C. Q. B. 350.

(5) 23 U. C. C. P. 548.

(6) *Woodhill v. The Great Western Ry. Co.*, 4 U. C. C. P. 449.

(7) *Eaton v. European & Northern Ry. Co.*, 59 Me. 520; 8 Rev. Rep. 430.

In *Nichol v. The Canada Southern*, (1) plaintiff's fences were thrown down by the defendants' contractor, and plaintiff requested defendants under the statute to fence off their line from his land ; there thus arose in this case a statutory duty to perform it, and there could be no doubt as to the defendants' liability for non performance, whatever their recourse against the contractor might be.

Where the company, by their engineers and other officials, constantly superintend, direct, and control the work while it is in progress, they would be responsible for all that the workmen did in the course of that work, although they were not the workmen of the company. (2) Where a person is authorized by Act of Parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work. (3) The employer would not be responsible where a contractor was doing work dangerous if not carefully done, when he had no reason to believe the contractor would not be duly careful. (4) Where the contractor does the very thing he was engaged to do, and it causes an injury, the employer may be made liable. (5)

Agents
generally.

43. Where persons are in fact employed by directors to transact business for a company, the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless : 1. their employment was altogether beyond the power of the directors ; or unless : 2, the persons employed have been appointed irregularly. (6) But where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with him *bona fide*, and without notice of the irregularity in his appointment. (7) And Maule, J., in *Smith v. Hall Glass Co.*, (8) ex-

(1) 40 U. C. Q. B. 583.

(2) *Burgess v. Grey*, 1 C. B. 578 ; *Serandat v. Saisse*, L. R., 1 P. C. 152 ; *Pendlebury v. Greenlough*, 1 Q. B. D. 36. See also *Browne v. The Ottawa & Brockville Ry. Co.*, 20 U. C. Q. B. 202.

(3) *Hole v. Sittingbourne, etc., Ry. Co.*, 6 H. & N. 488.

(4) *Daniel v. The Directors, etc. of the Metropolitan R. W. Co.*, L. R., 5 H. L. 45.

(5) *Ellis v. Sheffield Gas Consumers Co.*, 2 E. & B. 767.

(6) *Hawkin v. Bourne*, 8 M. & W. 703 ; *Lindley Comp.* 159 ; *Canada Central Ry. Co. v. Murray*, 8 S. C. R. 313.

(7) *Lindley Comp.* 159.

(8) 8 C. B. 668.

pressed the view which has been adopted by later authorities, that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act within the limits of their apparent authority ; and that strangers dealing *bona fide* with such persons have a right to assume that they have been duly appointed. (1)

44. A ratification, to be imputable to a company, must be made directly by its shareholders, or indirectly through their agents acting within the limits of their real or apparent authority ; and in order to establish ratification by the shareholders or their agents, it must be shown : 1. That the parties alleged to have ratified the contract knew what it was ; or having their attention drawn to it, did not choose to inquire into it. (2) 2. That they have in some way recognized and adopted it. (3)

If these two essential points are established, there will still remain for consideration the question whether the recognition and adoption have been in proper form. (4)

45. Since the case of *Fitzherbert v. Mather*, (5) it has been an undoubted rule of law that notice to an agent is notice to his principal ; but what shall be deemed sufficient, in the case of constructive notice to a principal, in order to bind him through his agent, has been the source of considerable litigation.

In England the rule is now that the knowledge of an agent is the knowledge of his principal, and his principal is affected thereby, whether such knowledge be acquired by the agent in the course of his employment or otherwise. (6)

(1) See Lindley Comp. 160.

(2) *La Banque Jacques Cartier v. La Banque, etc., de Montréal*, 13 App. Cas. 111.

(3) *O'Brien v. Credit Valley Ry. Co.*, 25 U. C. C. P. 275 ; *Baby v. The Great Western Ry. Co.*, 13 U. C. Q. B. 291 ; *Bury v. Corriveau Silk Mills*, M. L. R., 3 S. C. 218 ; *Soc. de Construct. d'Hochelaga v. Soc. de Construc.*, etc., 4 Q. B. R. 199 ; *Hamilton & P. D. Ry. Co. v. The Gore Bank*, 20 Chy. 190.

(4) Lindley Comp. p. 178.

(5) 1 T. R. 15.

(6) *Dresser v. Norwood*, 17 C. B., N. S. 466 ; and see *Carter v. Molson*, 10 App. Cases, at pp. 68-711.

CHAPTER III.

SHARES AND SHAREHOLDERS.

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1. The stock of the company is declared by sec. 75 of the Act Capital stock. to be personal property; and is subscribed for in the first instance upon the books of the company opened for that purpose by the provisional directors under the provisions of sec. 33. The amount of the capital stock is fixed by the special Act, and must be divided into shares of \$100 each. (1)

2. The original capital stock may be increased from time to Increase. time, to any amount, by vote of the holders of two-thirds in value of the subscribed stock, at a meeting expressly called by the directors for that purpose after 20 days special notice in writing to each shareholder. The increase is subject to the approval of the Governor-in-Council. (2)

Subscription.

3. It has been strongly contended that there is a difference Subscription between subscriptions before the company is in existence and for stock afterwards. The argument may be stated as follows. Before incorporation, or company is incorporated, there is an offer on the part of those organization wishing to become stock-holders to take shares. It is only, at of the company. the most, a mere proposition to take stock, and not a binding promise to take and pay, (3) and certainly does not constitute a contract which could be enforced by the party subscribing. He could not by his offer oblige the provisional directors to allot any of the shares to him. Even after incorporation a larger amount of stock than required might be subscribed for; and the power of the provisional directors to reject such applications, as they please, is not doubtful. (4) But the question is whether this offer, when accepted by the allotment of the stock, would become a binding contract upon notice of the allotment to the subscriber in proper time. It has been held in Quebec that a subscriber to a company to be incorporated, but who never subscribed after incorporation, nor received notice of allotment,

(1) Sec. 35.

(2) Sec. 37; *ubi supra* p. 14.

(3) Tessier, J., in *Arless v. Belmont Mfg. Co.*, M. L. R., 1 Q. B. 340.
Henry, J., in *Nasmith v. Manning*, 5 S. C. R. 441.

(4) Sec. 34, *ubi supra*, p. 13.

nor paid calls, is not liable for the stock. (1) And this view has been sustained by the Supreme Court. (2)

Nasmith v. Manning. The question arose in *Nasmith v. Manning* (3) in this way : Manning made an application to the provisional directors of the T. G. & B. Ry. Co., for shares, and signed the stock book, which was headed by an agreement by the subscribers to become shareholders for the amount set opposite their names, and upon allotment by the company they covenanted to pay ten per centum of the amount of the said shares and all future calls. The company, on the 1st July, passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the amount of shares held by him. The secretary prepared them, including one for Manning, and handed them to the company's broker to deliver to the shareholders. The brokers published a notice, signed by the secretary, in a daily paper, notifying subscribers to the capital stock of the T. G. & B. Ry. Co., that the first call of ten per cent. on the stock was required to be paid immediately to them. The respondent never called for or received his certificate of allotment, and never paid the ten per cent., and swore that he had

(1) *Union Nav. Co. v. Couillard*, 21 L. C. J. 71 (Q. B. 1877); *Arless v. Belmont Mfg. Co.*, M. L. R., 1 Q. B. 340 (1885); *Rascony v. Union Navigation Co.*, 24 L. C. J. 133 (1878); but see *Windsor Hotel Co. v. Date*, 27 L. C. J. 7 (S. C. 1881).

(2) *Nasmith v. Manning* 5 S. C. R. 417; *Magog Textile & Print Co. v. Price*, 14 S. C. R. 664 (10 L. N. 331). The same *v. Dobell*, ib., affirming 9 L. N. 348, Q. B.; 12 Q. L. R. 204, Q. B.; 14 R. L. 600, Q. B.

A subscription of shares in a company proposed to be incorporated is a mere proposition to take stock therein, and is not binding; but where the subscriber's name has been inserted in the letters patent, even without his knowledge or consent, he is liable as regards third parties. *Banque d'Hochelaga v. Garth*, M. L. R., 2 S. C. 201. The latter part of this decision was reversed in the Privy Council, and the letters patent annulled. 15 App. Cas. 414.

In an action by a judgment creditor of a railway company against the defendant to recover the amount of the shares which it was alleged "he had subscribed for," to become a member of the company to the extent of said shares, plaintiff produced stock book of company, but failed to prove defendant's signature there appearing. *Held* :—that the fact of defendant's name appearing in the act incorporating company as one of the provisional directors will not be considered as authorizing the court to presume he ever became a subscriber of shares, more especially when there is no proof of his having acted as a provisional director, or that he had attended any of the meetings of the company. *Rogers v. Hersey*, 15 L. C. R. 141 (1864.) See *Wilson v. Ginty*, 3 O. A. R. 124.

(3) 5 S. C. R. 417.

never had any notice of the allotment having been made to him. The Supreme Court held, affirming the Ontario Court of Appeal, that the document signed by Manning was only an application for shares, and that it was necessary for the appellant to have shown notice within a reasonable time of the allotment of shares to respondent, and no notice whatever of such allotment had been proved. From this judgment, Ritchie, C. J., and Gwynne, J., dissented, Strong, J., was absent, and Taschereau, J., stated that he felt great embarrassment in coming to a conclusion, and had vacillated a good deal about it. Unfortunately, for the sake of precedents, although leave was granted to appeal to the Privy Council, the case was settled before coming on for argument.

4. It is to be noted that the decision in *Nasmith v. Manning* After organization. only relates to subscriptions before organization of the company. As pointed out by Henry, J., who delivered the principal judgment in that case: (1) "We must look at this document from a standpoint very different from that we should occupy in the case of a subscription to the stock book of a company already in existence. A party in the latter case would, after his application for stock had been accepted, be called upon to sign the stock list in the book of the company kept for that purpose." And further on he says: (2) "If the signature of the respondent was to the regular stock book of the company after being organized, no allotment would require to be shown."

There is no doubt that in England, the contract for subscription of shares is entered into in a somewhat more technical or formal manner. An application, in the first instance, is made in writing for a specified number of shares, which application is held to be a mere offer, and is generally open for acceptance by the corporation for only a limited time. (3) If the application be accepted, the corporation formally allots to the applicant the desired number of shares, and gives him a notice of allotment within the time limited. The notice is of the essence of the con-

(1) At page 441, vol. 5, S. C. R. (2) At page 443.

(3) *Ramsgate, etc., v. Montefiore*, L. R., 1 Exch. 109; *Hebb's case*, L. R., 4 Eq. 9; *Gunn's case* L. R., 3 Ch. 40; *Pellatt's case*, L. R., 2 Ch. 527; *Household, etc., Co. v. Grant*, L. R., 4 Ex. Div. 216; *Ward's Case*, L. R., 10 Eq. 659; *Harris' Case*, L. R., 7 Ch. 587.

tract. So it is well settled in England, that, in order to make the contract to take up shares binding, there must be the application in writing, the allotment of the shares to the applicant, and a communication to him of the notice of allotment. (1)

But the reasoning of the English holdings upon this point proceeds entirely from the method of acquiring stock subscriptions in vogue in that country. As remarked by Lindley, in his work on companies: (2) "Allotment and notice are, in truth, only material where there is no agreement without them. In the ordinary case of an application for shares, there is no agreement in the absence of allotment and notice of it; but there may well be a binding agreement without either of them."

This is well shown in the English case of *Bird*, (3) cited by Lindley, where the holding reads: "A director of a company applied for and subscribed an agreement to take additional shares. He was entered upon the register in respect of the additional shares, but none were ever actually allotted to him. The company being wound up, *Held*: that his name was properly on the register, and ought also to be placed upon the list of contributors for such additional shares."

The difference between the English system and that in vogue in this country is clearly pointed out in *Lake Superior Nav. Co. v. Morrison*, by Chief Justice Hagarty, (4) as follows: "If there had been applications to the directors for shares, offering to take stock, and, as often happened, to an amount exceeding the number to be taken, we can easily see how important the question of allotment would be. A man may signify his readiness to take stock, and desire to have a certain number of shares, and unless some shares were allotted to him, it could not be said that he was the holder of any shares. In the case before us the proceeding was of a totally different character. Parties were canvassed to take stock, and by the act of subscription they actually subscribed for a specified number of shares, and expressly bound themselves to make payments thereon, as might be required by the board of directors. Little over half the capital stock was subscribed for, and no question did or could arise from the

(1) Cook, *Stockholders*, sec. 56.

(2) p. 761.

(3) 4 De G. J. & Sm. 200.

(4) 22 U. C. C. P., p. 220.

course adopted, as to any act to be done by the directors to allot any number of shares." Again, in *Smith v. Spencer* (1) it was held that the subscription to the stock book of a company was sufficient evidence of the party subscribing being a shareholder under the definition of that term in the Railway Clauses Consolidation Act, and that it was not necessary that scrip should be issued for the stock to constitute such subscriber a shareholder.

This was also the view held by our Court of Review in *Raseony v. Woollen Co.* (2) It was there stated by Loranger, J., that allotment is not usual in this country as it is in England. The subscription in this case was subsequent to incorporation, and *Nasmith v. Manning* (3) was quoted to show that allotment is not essential to constitute a person a subscriber to a company already formed. (4)

The question would seem to depend upon the form of the subscription. It is difficult to understand upon what principle a binding agreement may not be made to take shares in a company, whether organized or not, provided it be clear, precise and unequivocal, and contains the usual essentials of a contract.

(1) 12 U. C. C. P. 277.

(2) M. L. R., 2 S. C. 382; and *Alley v. Trenholme*, 3 Q. R. (S. C.) 169.

(3) 5 S. C. R. 417.

(4) Where a person has subscribed for shares in the capital stock of the company which is being organized and has assumed the position of shareholder, and has paid a portion of the calls made from time to time on the stock, he cannot set up alleged irregularities in the organization of the company as a valid reason for avoiding payment of the remainder of the calls. *Windsor Hotel Co. & Lewis et al.*, 4 L. N. 331; 26 L. C. J. 29 (Q. B. 1881)

Illegal acts on the part of the directors cannot be set up in defence to an action for calls by liquidators or assigns representing the creditors of the company. *Ross et al. v. Can. Agr. Ins. Co.*, 5 L. N. 23, 1882.

Appellant was solicited to subscribe for shares, and paid \$500, and signed his name to a subscription book, the columns of amount of subscription and number of shares being at the time left in blank. These columns were afterwards filled up for 50 shares by an agent of the company in appellant's presence, but without his consent. Appellant then tried to be relieved from the surplus shares without success, and later on received a dividend on the paid up capital and gave a receipt.

Upon an action to recover calls on 50 shares at \$100, alleged to have been subscribed.

Held (reversing Q. B. decision, 6 Q. L. R. 147 (Q. B.)): That the evidence showed that the appellant never contracted to take 50 shares, and that the receipt given for the dividend on amount paid in was not an admission of the liability for a larger sum, and he was not estopped but he was never in fact holder of 50 shares. *Coté v. The Stadacona Ins. Co.*, 6 S. C. R. 193.

The question should be determined in each case on the principles which govern ordinary contracts. (1)

It would be advisable to have subscription forms drawn in precise and unequivocal terms.

Conditional.

5. Subscription to stock in a railway company may be conditional, (2) but the conditions must be performed before calls can be made thereon, (3) although it is not necessary that they should be accurately fulfilled; it is sufficient if they be materially carried out. (4) Thus, where defendant subscribed on condition that the road be constructed to within $\frac{3}{4}$ of a mile of his tannery, it was held that defendant would be liable for calls if the road ran so near to his tannery as to substantially fulfill the condition. (5) An American railroad company were induced to extend their line to the Canadian boundary, on the condition that the inhabitants of the neighborhood would contribute their subscriptions to a certain quantity of shares in the road. The company's part of the condition was held to have been properly performed by bringing their line to the boundary in the neighborhood asked to contribute. And one of the subscribers could not escape his liability because the company had not brought their terminus to a point where he believed it was to be. The company were at liberty to select any convenient spot on the boundary line. (6) If an offer is made to take shares conditionally or upon unusual terms, a clear acceptance of these conditions or terms must be proved in order to constitute a binding agreement; and the mere fact that the shares have been placed in the applicant's name is not sufficient to bind him. (7)

The conditions must be assented to by those who are competent to bind the company; (8) they must be expressed in the subscription, (9) and must not be a secret qualification. (10)

(1) Per Ritchie C. J. in *Magog Textile Co. v. Price* 14 S. C. R. at p. 671.

(2) *Rogers v. Laurin*, 13 L. C. J. 175, Q. B. 1863.

(3) *Massawippi Railway Co. v. Walker*, 3 R. L. 450; *Rogers v. Laurin*, 13 L. C. J. 175 (Q. B. 1863).

(4) *Stanstead Ry. Co. v. Brigham*, 17 L. C. R. 54 (S. C. 1866).

(5) *Ibid.*

(6) *Conn. & Passumpsic Ry. Co. v. Comstock*, 1 R. L. 589 (Q. B. 1870).

(7) *Lindley Comp. 17. Shackleford's Case*, L. R., 1 Ch. 567.

(8) *Howard's Case*, 1 Ch. 561; *National Ins. Co. v. Chevrier*, 1 L. N. 591.

(9) *Jones v. Montreal Cotton Co.*, 1 L. N. 450, and 24 L. C. J. 108.

(10) *Port Dover & Lake Huron Ry. Co. v. Grey*, 36 U. C. Q. B. 426.

6. The company are not bound by an agreement between a subscriber and those who solicited him to become a shareholder, that he would pay for his stock in supplies to the company. (1) Nor where the agreement is to pay for stock in services; (2) or where the agreement is made with a provisional director, a chief promoter of the company, on the condition that the subscriber shall receive the contract for building the road. (3)

7. It is too late for a subscriber to repudiate his subscription when he has paid the first instalment and taken an active part, both as solicitor and shareholder, in promoting the affairs of the company, he being at the time in possession of the facts which gave rise to his repudiation. (4)

8. Shares subscribed to in a special subscription list, and made payable upon the performance of a certain condition, are payable without the making of regular calls. (5)

9. An Act of incorporation may be for two purposes, e.g.: the construction of the line from one point to another, and giving the company power to extend the line to another point. In such case it is quite competent for the company to receive subscriptions for stock to be applied to the main line, and the extension separately. (6) It is also competent for the parties respectively subscribing for these stocks to contract with the provisional directors, that beyond the usual ten per centum paid upon subscription, no other money whatever shall be called for, nor any calls be made, until a particular sum shall be subscribed for the main line, or for the extension line, as the case may be. (7)

10. Where a person subscribes for shares in a company incorporated for certain specified purposes, and not otherwise, yet if the shareholders apply to Parliament for extended powers, whereby the nature of the business is varied and extended, and, in the

(1) *Christin v. Union Nav. Co.*, Ram. Dig. 391 (Q. B. 1882).

(2) *Nat. Ins. Co. v. Hatton*, 24 L. C. J. 26 (Q. B. 1879), 2 L. N. 238.

(3) *Wilson v. Ginty*, 3 O. A. R. 124.

(4) *Nat. Ins. Co. v. Hatton*, 24 L. C. J. 26 (Q. B. 1879), 2 L. N. 238.

(5) *Stanstead & Connecticut Ry. Co. v. Brigham*, 17 L. C. R. 54 (S. C. 1866).

(6) *Port Dover & Lake Huron Ry. Co. v. Grey*, 36 U. C. Q. B., p. 438.

(7) *Ibid.*

opinion of the subscriber, rendered more hazardous than when he first became a member, such Act of Parliament is binding upon all shareholders, whether assenting or not to the application to Parliament. (1)

Transfer.

Shares may
be transferred.

11. Shares in the company may, by the holders thereof, be sold and transferred by instrument in writing, (2) made in duplicate,—one part of which shall be delivered to the directors, to be filed and kept for the use of the company, and an entry whereof shall be made in a book to be kept for that purpose; and no interest or dividend on the shares transferred shall be paid to the purchaser until such duplicate is so delivered, filed and entered. (3)

When complete.

12. The transfer is complete when entered in the stock ledger in the name of the transferee, although the acceptance has not been signed. And when so entered, a seizure of the shares under an execution against the transferor will not be upheld. (4)

Form of.

13. Transfers are made in the form provided by sec. 74, except in the case of paid-up shares, which may be made in such form as the by-laws prescribe, (5) "but no shares shall be transferable until all previous calls thereon have been fully paid up, or until the said shares have been declared forfeited for the non-payment of calls thereon; and no transfer of less than a whole share shall be valid." (6)

Right to.

14. Where shares are transferable, (7) and no restriction

(1) *Canada Car & Manufacturing Co. v. Harris*, 24 U. C. C. P. 380, and cases there cited.

(2) The verbal testimony of the secretary of a railway company, to the effect that it appeared by the books of the company that the shares originally in the name of the defendant had been transferred before the institution of plaintiff's action, who sues as a creditor of the company, to recover the amount unpaid on such shares, is insufficient to establish the fact of such transfer. *Cockburn v. Beaudry*, 2 L. C. J. 283.

(3) Sec. 73.

(4) *Woodruff v. Harris*, 11 U. C. Q. B. 490.

(5) Sec. 74.

(6) Sec. 75.

(7) Where a company are asked by a transferee to register stock transferred to him by another person, the company are justified in refusing to do so in respect of such shares as appear only in an entry of credit to the transferor of the shares in the ledger, but which are not standing in his name in the stock book. *MacMurrick v. Bond Head Harbour Co.*, 9 U. C. Q. B. 333, and see *Cockburn v. Beaudry*, 2 L. C. J. 283, *supra*.

on the right to transfer them is imposed by the by-laws of the company, or by the statute or charter by which it is governed, the right to transfer is absolute, and the directors cannot prevent a transfer, even if they are *bona fide* of opinion that it is for the interest of the company that they should do so.

(1). So under the section of a special Act incorporating a railway, which section is similar to sec. 73 of the present Railway Act, it was held that the clerk could not refuse to register a transfer of stock from one municipal corporation to another, on the ground that no by-law had been passed sanctioning such transfer. (2) Even a transfer to a pauper, in order to escape from liability, is valid, and cannot be prevented. (3)

But notwithstanding the length the courts have gone in holding the right to transfer to be free from all implied restriction, a transfer which is fraudulent in the sense of not being a real transfer out and out, or a transfer made for fraudulent purposes, (4) can be lawfully objected to by the directors. (5) But a transfer to avoid future liability or to multiply votes is held not to be fraudulent. (6)

Where, by the Act of incorporation, certain definite restrictions are placed on the right to transfer shares, the directors are bound strictly by the terms of those restrictions. (7) And where the Act requires the consent of the directors to a transfer, such power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly. (8)

(1) *Lindley Comp.* 464. *Moffatt v. Farquhar*, 7 Ch. D. 591; *Stranton Iron Co.*, 16 Eq. 559; *Weston's Case*, 4 Ch. 20. A company incorporated 27-28 Vic., cap. 23, has not power to refuse to allow a transfer of shares of its stock, without assigning a sufficient reason. *Smith v. Can. Car. Co.*, 6 P. R. 107.

(2) *Mun. Corp. of Vespra & Sunnidale v. Beatty*, 17 U. C. Q. B. 540.

(3) *Lindley Comp.* 464.

(4) A transfer of shares by a stockholder in a joint stock company, which is made with the object and has the effect of reducing the capital stock of the company, is void, and all resolutions of the directors authorizing such transfer are illegal and *ultra vires*. *Ross v. Worthington*, 5 L. N. 140. *Vide* also *Ross v. Fiset*, 8 Q. L. R. 251, p 56, *infra*.

(5) *Lindley Comp.* 465; *Weston's case*, 4 Ch. 20.

(6) *Lindley Comp.* 465.

(7) *Weston's Case*, 4 Ch. 20.

(8) *Exparte Penney*, 8 Ch. 446; *Poole v. Middleton*, 29 Beav. 646; *Robinson v. Chartered Bank*, 1 Eq. 32.

Section 58 of the Act gives the directors power to make by-laws for the disposition of the stock, etc.

In the absence of any provision of the special Act and of any by-law regulating this matter, the general law on the subject seems to be clear, that the powers of directors to refuse to permit a transfer of stock can be derived only from express authority, and cannot be extended by implication. (1) "Such a power," says Judge Dillon in *Johnson v. Laffin*, (2) "is so capable of abuse, and so foreign to all received notions and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of legislative expression, be held to exist."

In the United States, a transfer of shares in a failing concern, made by the transferor with the intention and for the purpose of escaping liability as a shareholder, to a person who for any cause is incapable of responding in respect of such liability, is void both as to creditors of the company and as to other shareholders. (3) But, on the other hand, it has been held that if the transfer is *bona fide*, and the transferor is ignorant of the insolvency of the transferee, and the company is not insolvent, the transfer is effectual, and the transferor is released from liability. (4)

The English rule goes further, as stated above, and a shareholder may transfer his shares to a man of straw for a nominal consideration, even although the sole purpose of such a transfer be to escape liability. But the transfer must be out and out, and not merely colorable and collusive. (5)

In this country the English rule has been fully adopted. (6)

In a recent New Brunswick case, (7) it was *Held*: "that where a director or other stockholder of the society had, prior

(1) *Weston's Case*, 4 Ch. App. 20; *Gilbert's Case*, 5 Ch. App. 559; *Chappell's Case*, 6 Ch. App. 902; *Stranton Iron & Steel Co.*, 16 Eq. 559; *Moffatt v. Farquhar*, 7 Ch. D. 591. *Johnson v. Laffin*, 103 U. S. 800.

(2) 103 U. S. 800. (3) *Cook, Stockholders*, § 263.
 (4) *Miller v. Great Repub. Ins. Co.*, 50 Mo. 55; *Cole v. Ryan*, 52 Barb. 168.

(5) *Cook, Stockholders*, § 266, and numerous cases there cited.

(6) *Held*: that the insolvency of the assignee was no objection to the transfer, the only condition to a valid transfer being the payment of all calls. *Moore et al. v. McLaren*, 11 U. C. C. P. 534; see also extract from report of same case, *infra* p. 45.

(7) 30 N. B. 628.

to the application for winding up, transferred shares in the society *bona fide*, such transfer was valid, and the transferor was not liable to be placed on the list of contributories, even though the transfer was made for the purpose of avoiding his liability for calls, with the knowledge that the society was in insolvent circumstances, and that the transferee was unable to meet any calls that might be made upon him, and although the consideration for the transfer was merely nominal, or even although he paid the transferee money to induce him to accept the transfer."

There is every reason to suppose that the Supreme Court would adopt this view, as the transfer of shares is a subject relating to the trade policy of the country, which is very distinctly in favor of freedom from restraint. And in a very recent House of Lords case, (1) Lord Herschell, quoting Blackburn, J., in *re Bahia & San Francisco Ry. Co.*, (2) said "that when joint stock companies were established, it was a great object that the shares should be capable of being easily transferred."

The fact that The Railway Act does not provide for such a contingency as we are now debating, excepting in so far as power is given to the directors to make by-laws regulating the matter, must lead us to the same conclusion as that arrived at by the Supreme Court of New Brunswick in the above case, where it was said: "The liability of shareholders is the entire creation of the Legislature, and cannot be any more or less. If it was intended that there should be any restriction on the right to transfer, or of ceasing to become a stockholder, the Legislature could have imposed it, and they must have known that this could be done, and they did not provide for such a case, and it would be simply an act of legislation for the Court to attempt to do it."

Again in Ontario it has been held that the insolvency of the assignee of the stock is no ground for vitiating the assignment, the only condition precedent for the valid assignment of stock being the payment of calls. (3) This case came under The Railway Clauses Consolidation Act, 14 & 15 Vic., c. 51, the relevant

(1) *The Balkis Consolidated Co. & Tomkinson*, 1893, App. Cas. 396.

(2) *L. R.*, 3 Q. B. 584.

(3) *Moore v. McLaren*, 11 U. C. C. P. 534; and see *Reg. v. Lambourn Valley Ry. Co.*, 22 Q. B. D. 463 (1888.)

clauses of which have been re-enacted almost *verbatim* in the present Railway Act.

Finally, Mr. Wood, in his work on Railways, says: "Directors have no right to refuse a transfer because, in their judgment, the motives and purposes of the parties are improper, or because the transfer may injuriously affect the company. (1)

Liability of
company for
fraudulent
transfer.

15. P., the owner of numbered shares in a joint stock company, transferred them to persons who were registered in the company's books as proprietors of shares. P. afterwards fraudulently executed a transfer of the shares for value to T., who sent the transfer to the company, and received from them a certificate under their common seal, stating that he was the proprietor of the shares. T., acting *bona fide* on the faith of the certificate, sold the shares, but the company refused to register the purchaser as the proprietor, on the ground that after granting the certificate to T. they had discovered that he was not the real owner of the shares. It was held that the company were estopped by their certificate from denying that T. was the proprietor of the shares, and that he was entitled to recover from the company the damages which he had in fact sustained owing to their refusal to register the purchaser. (2)

Measure of
damages for
neglect to
transfer.

16. An action was brought against a railway company for neglecting to register a transfer of shares in the books of the company which had been transferred by the plaintiff to a creditor as collateral security, the arrangement being that the creditor should sell the shares at the best rate, and after deducting the amount of claim, pay over the balance to the plaintiff; and after repeated demands on the company to register such shares, they were finally registered and sold; but in the interim a great depreciation had taken place in their value, and plaintiff brought action by way of damages for the difference.

The court held, that the plaintiff was entitled to such action, and that the measure of damage was the difference between the price of the stock at the time of refusal and the price at the time of the subsequent registration of stock. (3)

(1) Ed. 1885, p. 253; and see Moreton, J., in *Crocker v. Old Colony Railroad Co.*, 30 Alb. L. J. 495; and *Cook, Stockholders*, § 385, 395.

(2) *The Balkis Consolidated Co. v. Tomkinson* (1893), App. Cas. 396.

(3) *Grand Trunk Ry. Co. v. Webster*; 6 L. C. J. 178 (Q. B. 1861).

17. It has been held in a recent English case, (1) that where an action for mandamus will lie, the prerogative writ will not be allowed to issue to compel transfer of shares. (2) This case seems to mark a new departure in this respect, and it will now be seldom necessary or proper to apply for a prerogative writ to settle disputes between companies and their members. (3)

In order that a mandamus may lie to compel a company to transfer shares, there must be a distinct refusal on the part of the company to do so. A refusal in effect, though not in direct terms, would be sufficient to give rise to such an action. But no rule can be laid down for determining whether there has been a refusal or not. (4)

(1) *The Queen v. Lambourn Valley Ry. Co.*, 22 Q. B. D. 463.

(2) Where a petition for a mandamus was demanded against a railway company, to compel it to make the necessary entries in their books of the sale to the petitioner of a number of shares in the capital stock of the company :

Held to be the duty of a clerk or secretary to enter the names and places of residence of the owners of stock in the company, and that the Superior Court had jurisdiction to enforce such order under 12 Vic., cap. 41. *MacDonald v. Montreal & New York Ry. Co.*, 6 L. C. R. 232 (1856).

In an action against a Harbour Co., for refusing to register a transfer of stock by one S. to the plaintiff.

Held : that although S being president of the company might perhaps have refused his assignment himself, yet that the refusal of the secretary to do so for a good ground of an action against the company. *MacMurrick v. Bond Harbour Co.*, 9 U. C. Q. B. 333.

N. was the banker of a railway company ; he was also one of the directors. Under certain business arrangements of the company he was entrusted with the possession of certificates which represented shares, and those shares he held as trustee for the company. He converted the shares. The conversion was discovered. He gave an explanation, replaced the shares, and continued to hold the certificates as before, and stood on the register as the apparent owner of them. He borrowed money of R., and deposited the certificates with R., who held them for some time without having taken any step to be registered as the owner of the shares. R.'s widow and executrix applied to be registered as the owner ; her application was refused. She moved for a mandamus to compel registration ; the Court of Q. B. refused the mandamus. The Exchequer Chamber reversed that decision, and ordered it to issue. *Held* : by House of Lords, that this was the ordinary case of a trustee abusing his trust ; that if R. had made proper inquiries he would have found that H. was only a trustee ; that negligence sufficient to affect their equitable title could not be imputed to the directors and the company, and consequently the equitable title of R. could not prevail against the earlier equitable title of the company.

By the Lord Chancellor : Whether a transfer of shares in a company can or cannot be made without the production of the certificates of the shares is a matter entirely within the discretion of the directors. *Shropshire Union Rys. & Canal Co. v. Regina*, L. R., 7 H. of L. 496.

(3) *Lindley Comp.*, 603.

(4) *Lord Denman in Reg. v. Thames & Isis Navigation*, 8 A. & E. 904.

In Ontario, however, it has been held that when several demands to transfer the stock were made, and delays and evasive answers given, without in direct terms refusing, a mandamus could be directed to the company. (1)

Transmission otherwise than by transfer.

18. If any share in the capital stock of the company is transmitted by the death, bankruptcy or last will, donation or testament, or by the intestacy of any shareholder, or by any lawful means other than transfer, the person to whom such share is transmitted must deposit in the office of the company a statement in writing, signed by him, which shall declare the manner of such transmission, together with a duly certified copy or probate of such will, donation or testament, or sufficient extracts therefrom, and such other documents or proof as are necessary, and without such proof the person to whom the share is so transmitted, as aforesaid, shall not be entitled to receive any part of the profits of the company, or to vote in respect of any such share as holder thereof. (2)

As to what proofs would be necessary; if there were a will, in Quebec the production of a notarial copy if in notarial form, or of a certified copy of the probate if in holograph or English form, would be sufficient; in the other provinces, a certified copy of the probate and letters of administration.

In the case of intestacy, in Quebec the company might require certificates of the death of the shareholder, (3) and the birth of the heirs claiming, (4) extracted from the official registers of civil status, (5) as well as affidavits or declarations or such other proof as might be necessary to establish heirship; and if the shares were to be divided among the heirs, a copy of the deed of partition. (6)

In the other Provinces, in the case of intestacy, a certified copy of letters of administration, issued in accordance with the law of the particular Province, would seem to be all that would be necessary.

Company not bound to see to trusts, etc.

19. The company is not bound to see to the execution of any trust, whether express, implied or constructive, to which any

(1) *In re. Goodwin & The Ottawa & Prescott Ry. Co.*, 13 U. C. C. P. 254.

(2) Sec. 76.

(3) C. C. 67.

(4) C. C. 54.

(5) C. C. 42-50.

(6) C. C. 689-711.

share or security issued by it is subject, and whether or not the company has had notice of the trust, and it may treat the registered holder as the absolute owner of any such share or security, and, accordingly, shall not be bound to recognize any claim on the part of any other person whomsoever, with respect to any such share or security, or the dividend or interest payable thereon. (1)

This section is accompanied with the proviso that nothing therein contained shall prevent a person equitably interested in any such share or security from procuring the intervention of the Court to protect his rights.

Similar provisions to the above, contained in Acts relating to joint stock companies, have been given the fullest effect to both in England (2) and in this country (3) in protecting the corporation from claims in connection with trusts, whether express or implied, to which their shares might be subject.

If, however, the company were to deal with, for their own benefit, stock held in trust or subject to a trust of which they had notice, they would be obliged to account to the true owner for the shares, should it appear that the person from whom they got the shares had not authority to deal with it. (4)

20. And in such a case where the shares are held by a person "in trust," these words import an interest in some other person, though not in any specified person, and clearly show an infirmity or insufficiency in the holder's title; and are enough to put the company upon enquiry. (5)

But the contrary would seem to be the rule, and the section would have its full force and effect, where the company merely allowed a transfer to a third person, and had no pecuniary interest in the transaction; provided always that the transferor were not devoid of authority to transfer.

(1) Sec. 77, as amended by 55-56 Vic., cap. 27.

(2) *Bank of Eng. v. Hariga*, 3 Vesey 33; *Bank of Eng. v. Parsons*, 5 Vesey 665; *Bank of Eng. v. Lunn*, 15 Vesey 583; *Gray v. Johnston*, L. R., 3 H. of L. 1; *ex parte Santa Barbara Mining Co.*, 38 W. R. 711 (*Coleridge, C. J.*, 1890).

(3) *Simpson v. Molsons Bank*, to be reported in Vol. 3 or 4, Q. R. (Q. B.); confirmed in P. C. 1895 (not yet reported).

(4) *Bank of Montreal v. Sweeney*, 56 L. J. P. C. 79; and L. R., 12 App. Cas. 617.

(5) *Ibid.*

Want of authority or power in the transferor.

21. Where the want of authority is apparent, the company might be held accountable to the true owner. For instance, in Quebec, where shares in a bank stood in the name of a tutor to a minor, and the bank allowed the transfer to be made by the tutor, without the authorization of the Court upon the advice of a family council, as required by the laws of that Province, (1) it was held that the bank was liable for the value of the shares (which had been dissipated and lost), on the ground that the tutor had no power to sell. (2) As was said by the Privy Council: "When this excess of power is once established, then the sale is in fact the sale of a stranger, and as if a stranger had sold these shares, and had then by fraud and forgery induced the bank to make the transfer of them in their books." (3)

Succession duty unpaid.

22. In this connection it may be doubtful, where a Provincial Legislature has imposed a tax or succession duty upon property transmitted by the decease of the owner, and has declared that all transfers of stock belonging to the succession shall be void and shall pass no title until the tax is paid, whether a company allowing a transfer to be made before the tax is paid would not be liable to those persons who might suffer thereby. The decision of this question would depend largely upon the language of the particular statute.

In the Province of Quebec such a statute was recently passed, (4) which not only declared that all transfers of property, shares, etc., belonging to the succession would be null and void, and pass no title, (5) but also that no executor, administrator, trustee, etc., should consent to or make any such transfer until the tax had been paid. (6)

Applying the reasoning in *The Bank of Montreal v. Simpson*, (7) it would seem that in the case of a company allowing an executor to transfer before the tax had been paid, the company would be liable to the beneficiaries if the shares or their proceeds were dissipated or lost; inasmuch as the sale would be an absolute

(1) C. C. 297.

(2) *Bank of Montreal v. Simpson*, 14 Moore P. C. 417.

(3) *Ibid.*, p. 445; and see *Colonial Bank v. Williams*, 15 App. Cas. 267.

(4) 55-56 Vic. Cap. 17.

(5) *Ibid.*, sec. R. S. Q. 1191 d. (5)

(6) *Ibid.*

(7) 14 Moore P. C. 417.

nullity, and the power of the executor to sell, with which he might be clothed under the will, had been taken away by the statute, and the sale would be an act in excess of his powers until he should have fulfilled the condition precedent of paying the tax; just as the tutor's act in selling the shares in the Simpson case was held to be in excess of his power because he had not fulfilled the condition precedent of obtaining an authorization from the Court.

The question, however, has not yet been judicially passed upon; and in the meantime it would seem a safe and conservative course for companies to refuse transfers, where such an act is in force, until the succession duty to which their shares may be subject has been paid.

23. Any shareholder who is willing to advance the amount of Interest on his shares, or any part of the money due upon his shares, beyond sums paid in advance, the sums actually called for, may pay the same to the company, and upon the principal moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made or the shares in respect to which such advance is made, the company may pay such interest, at the lawful rate of interest for the time being, as the shareholders who pay such sum in advance, and the company, agree upon; but such interest shall not be paid out of the capital subscribed. (1)

Actions by Creditors against Shareholders.

24. Every shareholder is individually liable to the creditors Liability of of the company for the debts and liabilities of the company, shareholders. to any amount equal to the amount unpaid on the stock held by him, and until the whole amount of his stock has been paid up;

(1) Sec. 85.

In an action by McK. under the C. S. C., ch. 63, against K. *et al.*, shareholders of a joint stock company incorporated under that Act, to recover the amount of an unpaid judgment they had obtained against the company, the defendants pleaded *inter alia* that they had paid up their full shares, and thereafter and before suit had obtained and registered a certificate to that effect.

Held: affirming the judgment of C. P., that under secs. 33, 34 and 35, chap. 63, as soon as a shareholder has paid up his full shares and has registered, although not until after the 30 days mentioned in sec. 35, a certificate to that effect, his liability to pay any debts of the company then existing or thereafter contracted ceases, excepting always debts to employees as specially mentioned in sec. 36. *McKenzie v. Kittridge*, 4 S. C. R. 368.

but no such shareholder shall be liable to an action in respect of his said liability until an execution at the suit of the creditor against the company has been returned unsatisfied in whole or in part. (1)

The word "creditors" used in this section is seen to be plural, but it is evident that a single creditor may pursue the remedy given by the statute. (2)

Execution
against the
company.

25. With regard to executions against the company, all the court requires of the creditor is that he make proof of having made reasonable attempts to obtain payment from the company, and to discover assets presently available for his satisfaction, and that such attempts have been unsuccessful. (3) A mere general assertion by a solicitor's clerk, that writs of *feri facias* have been issued against the company and returned *nulla bona*, is not sufficient. (4) But if attempts have been made to discover assets, and these attempts have been fruitless, and a writ of *feri facias* has issued against the company, and been returned *nulla bona*, that will be sufficient until it is shown affirmatively that the company has assets; and even if the company has assets which have not been taken into execution, still, if the court is satisfied that they are insufficient to satisfy the plaintiff, the action would lie. (5) The making of calls by directors is not a condition precedent to the creditor's right to recover. (6)

It has been held to be not necessary that a *feri facias de bonis* should be returned *nulla bona* from all the counties through which the railway runs. (7)

Cause of action in such cases.

26. The cause of action arises where the company has its principal office and where judgment is rendered for the debt due by the company, and execution is issued, and not at the place where the stockholder subscribed for his shares, if outside the district of the head office. (8).

(1) Sec. 86.

(2) *Moore v. Kirkland*, 5 U. C. C. P. 452.

(3) *Moore v. Kirkland*, 5 U. C. C. P. 452. *Lindley Comp.* 291.

(4) *Hitchins v. The Kilkenny R. R. Co.*, 10 C. B. 160, 15 C. B. 459.

(5) *Lindley Comp.* 291.

(6) *Moore v. Kirkland*, 5 U. C. C. P. 452.

(7) *Jenkins v. Wilcock*, 11 U. C. C. P. 505.

(8) *Welch v. Baker*, 21 L. C. J. 97, 1876.

Where an action was brought in Ontario against a shareholder, there resident, of a company whose head office was in another Province where judgment had been obtained by the plaintiff against the company, and execution thereon had been returned unsatisfied, it was *Held*: that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario. (1)

27. Before the above case was decided, it seems to have been uncertain in Ontario whether the action against the shareholder should be commenced by writ of summons or by writ of *scire facias*. In the earlier Ontario cases, the remedy was generally enforced by action. (2) But in later cases the proceeding is by *scire facias*. (3) This is the proceeding adopted in England. (4) But the language of the English Statutes, relevant to this point, differs from ours in that leave must be obtained from the judge, in addition to the return of *nulla bona*, before the action can be taken against the shareholder. In the leading Ontario case, above mentioned, (5) it was decided that while in such cases *scire facias* was the appropriate form of proceeding against a shareholder within the jurisdiction, it does not follow, seeing the particular phrasing of the Act, that an action which is not *scire facias* will not lie.

How action against shareholder should be commenced

In Quebec the action is begun by a writ of summons in the ordinary form.

28. While payment in good faith by a shareholder to judgment creditor is, for the purposes of the Act and to the extent of the payment, a good defence to an action by another creditor of the company, a merely colourable payment, e.g. to a trustee for the defendant, will not avail. (6)

Defences.—
Payment.

It was held a good defence in an action by a creditor of the company against a municipal corporation, a shareholder in the

(1) *Brice v. Munro*, 12 Ont. App. Rep. 453. (1886), and see *Jenkins v. Wilcock*, 11 U. C. C. P. 505.

(2) *Moore v. Kirkland*, 5 U. C. C. P. 452; *Jenkins v. Wilcock*, 11 U. C. C. P. 505; *Tyre v. Wilkes*, 13 U. C. R. 482, 18 U. C. R. 46 and 126.

(3) *Gwatkin v. Harrison*, 36 U. C. Q. B. 478; *Page v. Austin*, 26 U. C. C. P. 110.

(4) *Lindley Comp.* 290.

(5) *Brice v. Munro*, 12 Ont. App. 455.

(6) *Nasmith v. Dickey*, 42 U. C. Q. B. 450; 44 Q. B. 414.

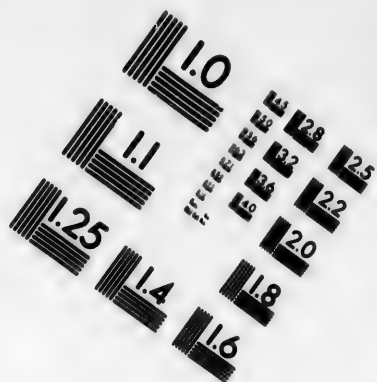
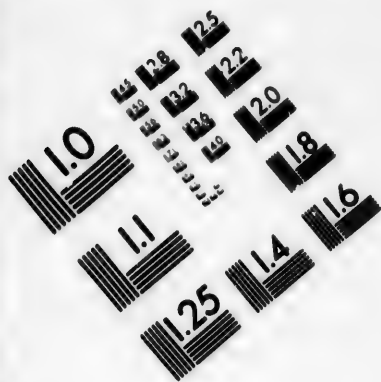
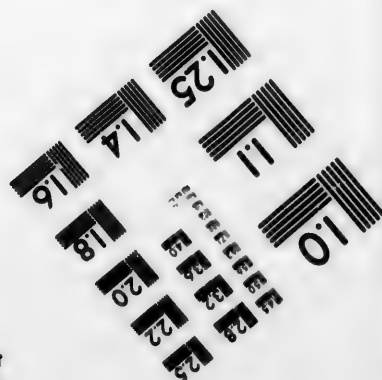
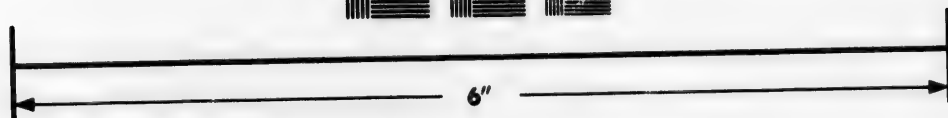
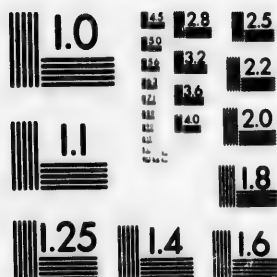


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company, that in pursuance of an agreement at the time of subscription, the municipal corporation had paid for their stock to the contractors of the road as the road progressed, said contractors having a 999 years' lease of the road, and having mortgaged their lease to trustees to secure payment to such municipalities of 6 per cent. on the sums subscribed by them. (1)

Where in such action the defendant pleaded that, before the commencement of the suit, the railway company sued him for the same monies, and that after being served with the writ of summons in that case, and before declaration in either case, and after the commencement of the suit, he paid the company in full; it was held no defence, as it was not averred that such payment was made in ignorance of plaintiff's claim. (2)

Defences.—
Cessation of
Company.

29. The cessation of a company, by non-performance of the conditions of its charter within three years, does not extinguish its liability or that of its stockholders to pay the debts contracted during its existence. (3)

Defences.—
Non-perfor-
mance of con-
ditions.

30. Irregularities in the nomination or appointment of directors will not discharge the liability of the shareholders. (4) Where a subscription is conditional, and the condition has not been performed, a judgment creditor of the company has no action against the holder of such shares; (5) unless the condition was *ultra vires* the company or its representative, or where the shareholder has made a payment on the shares, or has otherwise made himself liable as a shareholder. (6)

Defendant had signed the stock book of the company for 40 shares, but he alleged that this was done upon the faith of a verbal agreement with a provisional director and chief promoter of the company that defendant and another should receive the contract for building the road. There was no proof that defendant had received any formal notice of the allotment of shares, but he paid 10 p.c. thereon, because, as he alleged, the provi-

(1) *Woodruff v. Corp. of Town of Peterborough*, 22 U. C. Q. B. 274.

(2) *Tyre v. Wilkes*, 13 U. C. Q. B. 482.

(3) *Ray v. Blair*, 12 U. C. C. P. 257.

(4) *Ryland v. Ostell*, 2 L. C. J. 274; *Ross v. Can. Agr. Ins. Co.*, 5 L. N. 23; *Windsor Hotel Co. v. Lewis*, 4 L. N. 331, 26 L. C. J. 29 (Q. B. 1881).

(5) *Rodgers v. Laurin*, 13 L. C. J. 175. See subscriptions, conditional, *supra*.

(6) *Wilson v. Ginty*, 3 O. A. R. 124.

sional director told him that he would not get the contract unless he paid it. He also attended a meeting of the shareholders, and seconded a resolution granting an allowance to the directors. It was held, that the payment of the 10 p. c. made him a shareholder, and that he could not repudiate his liability on the ground that he had not been awarded the contract, for the provisional director had no power to bind the company by annexing such an agreement to his subscription. (1)

A shareholder in subscribing for stock gave the manager of the company a power of attorney to subscribe for him ten shares, such power of attorney containing the words "and I herewith enclose 10 p.c. thereof, etc., etc." The 10 p.c. was not enclosed, although the amount was placed to the credit of the shareholder on the books of the company. In an action against the shareholder by creditors of the company for contribution, he pleaded that the sum to his credit was for professional services to the company, and that there was an arrangement that his stock was to be paid for by such services. The Court held that he was bound to contribute. (2) Where a person was requested to take shares, and objected on the ground that there was unlimited liability, but was afterwards persuaded to contribute, upon the assurance that a Bill was to be passed through Parliament to limit the shareholders' liability; and paid the deposit, but afterwards refused to pay calls; and the Bill promised had not been passed, but he subsequently agreed to pay a certain call provided his name was struck off the list of contributories; and the company was subsequently wound up, and his name put on the list of contributories; it was held: that it must be removed therefrom; that the directors had had the power to make a compromise of a disputed claim, and this case came within their power, and that power had been *bona fide* and rightly exercised. (3)

31. The failure of directors to make calls has been held to be no defence to an action by creditors, (4) nor irregularities in the nomination or appointment of directors. (5)

(1) *Wilson v. Ginty*, 3 O. A. R. 124.

(2) *In re. Standard Fire Ins. Co.* (Caston's case), 12 S. C. R. 644.

(3) *Dixon v. Evans*, L. R. 5 E. & I. App. 606.

(4) *Cockburn v. Starnes*, 2 L. C. J. 114 (S. C. 1857).

(5) *Ryland v. Ostell*, 2 L. C. J. 274; *Cockburn v. Tuttle*, 2 L. C. J. 285 (S. C. 1858).

Defences.—
Shares remitted
to company.

32. Unless a company is specially authorized by its charter, it cannot reduce its capital nor buy its own shares, nor accept a remission of them from the shareholders. Such acts are *ultra vires*, and do not free the shareholders from liability towards creditors of the company. (1)

Defences.—
Shares acquired as
paid up.

33. Where shares are acquired in good faith as fully paid up, without any notice from the transferor that they are not so, the holder will not be liable to the creditors of the company for the amount unpaid. (2) And if shares are taken in the course of business for valuable consideration, the burden of proof lies on the person who asserts that he who took the shares had notice that they were not actually paid up. (3)

Defences.—
No notice of
allotment.

34. Where the subscription is to a company about to be organized, it may be a defence that there was no allotment of shares with notice thereof within a reasonable time, to constitute the subscriber a shareholder within the meaning of The Railway Act. (4)

Defences.—
Never a
shareholder.

35. In an action against defendant as a stockholder for unpaid stock, it appeared that the defendant signed the stock book, which was headed by an express agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names; and upon allotment by the company "of my

(1) *Ross v. Fiset*, 8 Q. L. R. 251; see also *Ross v. Dusablon*, 10 Q. L. R. 74; *Ross v. Worthington*, 5 L. N. 140, as at p. 43 *supra*.

(2) Shares were allotted by resolution of directors among themselves at 40 per cent. discount, their then supposed value, and scrip issued as fully paid up. G. acquired shares under this arrangement, and sold to defendant, representing them to be fully paid up. Defendant inquired of the secretary of the company, who also informed him that they were fully paid up shares, and he accepted them in good faith as such, and about a year later became a director of the company. The shares appeared as fully paid up on the transfer books, but the true state of the case could have been ascertained by reference to the Ledger or Journal, whilst on each counterfoil in the share book the amount mentioned was:—Shares, two at \$300 = \$600.

Held (reversing judgment of Court of Appeal for Ontario, 1 O. A. R. 1): that a person purchasing shares in good faith, without notice from an original shareholder, under 27 and 28 Vic., ch. 23, as shares fully paid up, is not liable to an execution creditor of the company whose execution has been returned *nulla bona* for the unpaid amount of said shares. *McCracken v. MacIntyre*, 1 S. C. R. 479.

(3) *Burkinshaw v. Nicolls*, 3 App. Cas. 1004.

(4) *Nasmith v. Manning*, 5 S. C. R. 417. *Vide supra*, p. 36.

or our said respective shares," they covenanted to pay 10 per cent, and all future calls. The directors passed a resolution directing the secretary to issue allotment certificates. The secretary prepared certificates, and they were delivered to the company's broker to deliver to shareholders. It did not appear that the certificate was ever delivered to defendant, or that he was ever expressly notified of the allotment, and he never paid the 10 per cent. He received notices of calls to which he paid no attention. The evidence showed that he did not consider he was entitled to any notice, and that he based his belief that he was not a shareholder simply on the ground that he had not paid the 10 per cent. It was *Held* (affirming 43 U. C. Q. B. 22): that the evidence was sufficient to prove that knowledge of the acceptance of his offer by the company had reached the defendant, and that he was therefore liable as a shareholder, and that it was not *ultra vires* of the directors to take his subscription without receiving the ten per cent. thereon. (1)

36. Where material change is made in the capital of a company, and there is no acquiescence or laches on the part of the subscriber, he cannot be held liable as a contributory. (2)

Defences.—
Change of capital.

37. Ignorance of differences between the memorandum of association and prospectus is not a good defence after failure of the company, where the defendant might have discovered the difference with proper diligence. (3)

Defences.—
Difference between memo. of association and prospectus.

(1) *Denison v. Leslie*, 3 O. A. R. 516.

(2) *Stevens v. The London Steel Works Co. (Delano's Case)*, 15 O. R. 75. In this case one D. signed his name as a subscriber for a certain number of shares at the foot of a prospectus of a proposed company, in which it was stated that the capital was to be \$75,000. Without D.'s knowledge or acquiescence, the company as afterwards incorporated, had a capital of \$150,000. In accordance with the terms of the subscription, and before the incorporation of the company, D. paid up half the amount of his shares. There was no allotment of stock to D., no entry of his name in any stock book, and no acting on his part as shareholder. The company being in process of liquidation it was claimed that D. was a contributory.

Held: that the change made in the capital of the company was a material one, and there being no acquiescence or laches on D.'s part he was not liable as a contributory.

(3) *Oakes v. Turquand*, L. R., 2 H. of L. 325.

In May, 1864, A. published a prospectus of a proposed company, and B. took shares in it, and paid the first deposit, and a memorandum of articles of association was registered in June. After inquiry instituted by B. in December,

Defences.—
Ultra vires.

38. A company incorporated with power to increase by by-law the capital stock of the company, as soon as but not before the original stock was all allotted and paid up, assumed to pass a by-law increasing the capital stock before the original amount had been paid up. In an action by the creditors against a subscriber of the new capital stock, it was *Held* (reversing the judgment of the court below): that the by-law so passed by the company being *ultra vires*, the alleged shares of the defendant had not any existence in law, and therefore that the plaintiffs had failed to establish that the defendant was a shareholder within the statute, (1) and consequently they were not entitled to recover. (2)

Defences.—
Fraudulent
misrepresentation.

39. Where by fraudulent misrepresentations of the directors, or by their fraudulent concealment of facts, a person is drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, and he may rescind it, but he must do so within a reasonable time. (3) Nor can the directors set up that he might have known the truth by proper enquiry. (4)

Defences.—
Forfeiture.

40. On the 14th May, 1853, the directors of a company passed a resolution, declaring that the shares mentioned in a schedule, intended to be annexed, had become forfeited for non-payment of a call made on the previous 21st Jan., and should be sold on the 21st June, unless previously redeemed. The company had not afterwards treated defendant as a shareholder, nor had he acted as such. The resolution for the sale of the stock had not

1864, he paid a further deposit, and an application was afterwards made by a third party to wind up the company. In January, 1865, B. applied for and obtained an order to have his name removed from the register of the company, upon the ground that the memorandum varied in many respects from the prospectus, so as, in fact, to constitute a totally different undertaking, and alleged that till December, 1864, he had never known of the two documents.

Held: that an application by A. to rescind the order for the removal of B.'s name had been rightly refused by the Court below. *Dowes v. Ship*, L. R., 3 H. of L. 343.

(1) 27-28 V., cap. 23.

(2) *Page et al. v. Austin*, 7 O. A. R. 1, confirmed in Supreme Court, 10 S. C. R. 132.

Where an action is brought against a shareholder in an incorporated joint stock company, he may plead a non-compliance with its Act of incorporation, and that by reason of such non-compliance the company is not legally in existence. *Que. & Richmond Ry. Co.*, 1 L. C. R. 366.

(3) *Oakes v. Turquand*, L. R., 2 H. of L. 325.

(4) *Venezuela Ry. Co. v. Kisch*, L. R., 2 H. of L. 99.

been acted on by the company, a statute having passed before the day named for sale, making new provisions as to forfeiture or abandonment of shares which had not been complied with. It was held that the defendant was still liable as a shareholder. (1)

41. In Quebec, under art. 1716 C.C., an agent who subscribes stock in a company in his own name is liable to creditors of the company as a shareholder, without prejudice to the creditors' rights against the principal also. (2)

42. It has been held in Quebec that notwithstanding the transfer by the shareholder of his shares previous to the institution of the action by the creditor, the latter could recover if the debt accrued and became due while the shares were in the shareholder's name in the company's books. (3)

43. But this would seem to be contrary to the general principles regarding the freedom of the right to transfer previously enlarged upon, (4) and it would seem more in accordance with principle and the language of the Act, to say that the liability accrues only when execution against the company is returned unsatisfied. (5)

44. In an action by a creditor against a shareholder of unpaid stock in a company incorporated under 32-33 Vic., ch. 13 D, it was held that a shareholder, under a plea that the judgment was obtained by fraud, was entitled to set up a defence that the company had not in the original suit been served with process, under sec. 50, the person served as secretary not being such officer. (6)

45. Entry of shares in the stock book by the secretary of the company upon a verbal promise of the defendant, but in his absence, is not sufficient to charge him. (7)

Appellant was solicited to subscribe for shares, and paid \$500, and signed his name to a subscription book, the columns of

(1) *Smith v. Lynn*, 3 U. C. Error & Appeal R. 201 (Grant).

(2) *Molson's Bank v. Stoddard*, M. L. R., 6 S. C. 18.

(3) *Cockburn v. Beaudry*, 2 L.C.J. 283 (S. C. 1858).

(4) *supra* p. 42 *et seq.*

(5) *Nixon v. Brownlow*, 3 H. & N. 686.

(6) *Harvey v. Harvey*, 9 O. A. R. 91.

(7) *Ingersoll & The Thamesford Gravel Road Co. v. McCarthy*, 16 U. C. Q. B. 162.

amount of subscription and number of shares being at the time left in blank. These columns were afterwards filled up for 50 shares by an agent of the company in appellant's presence, but without his consent. Appellant then tried to be relieved from the surplus shares without success; and later on received a dividend on the paid up capital, and gave a receipt. Upon an action to recover calls on 50 shares at \$100, alleged to have been subscribed, it was held that the evidence shewed that the appellant never contracted to take 50 shares, and that the receipt given for the dividend or amount paid in was not an admission of the liability for a larger sum, and he was not estopped, but he was never in fact holder of 50 shares. (1)

Defences.—
Set-off.

46. It is a question as to whether, under the Act, the shareholder can plead the company's indebtedness to him as a set-off against the unpaid balance of his stock, in an action by the creditor. In Quebec the question has been considered in the case of *Ryland v. Delisle*, (2) where it was held that, as no calls in respect of the unpaid stock held by the defendant had been made, the provisions of Arts. 1187-1188 of the Civil Code did not apply, and that the compensation (set-off) had not taken place between the defendant's indebtedness as a shareholder and the company's indebtedness to him. In this case the company were indebted to the defendant for salary as president in a sum exceeding the amount of his unpaid stock. But under Art. 1188 of the Code, the debts, in order to be compensated, must be "equally liquidated and demandable." Until calls had been made by the directors, and the proper interval of time allowed to lapse before they would become due, payment could not have been enforced, and therefore the debt was not "demandable." On the other hand, the defendant, at the time the creditor brought his action, had a right to proceed against the company and recover payment of the sum due by them to him for salary; but the company could not have set up as against that action any counter-claim which they might have had in respect of his being a shareholder. The debts, therefore, did not exist "simulta-

(1) *Côté v. Stadacona Ins. Co.*, 6 S. C. R. 193.

(2) 3 L. R. P. C. 17; 6 Moore P. C. (N. S.) 225; see also *Harris v. Dry Dock Co.*, 7 Grant's Chy. 450. *infra* p. 63.

neously," and the Privy Council held (1) that the creditor had a right to recover from the shareholder everything that was due from the shareholder to the company which was not actually paid, discharged or extinguished, and that, as there was no compensation as between the shareholder and the company, there was consequently no extinguishment of the debt. (2)

Decisions under the English law on this point are hardly applicable here. The Companies' Acts contain a clause quite similar to sec. 86 of The Railway Act; but in order to do away with difficulties, arising through the procedure incident to this section, certain clauses were included in the winding up Acts. But our winding up Acts do not apply to railway companies, while those in England do.

The case in which this point seems to have been considered most seriously in Ontario is that of *Macbeth v. Smart*, (3) which decided that a shareholder, in an action against him by a judgment creditor of the company, could not set off, in equity, a debt due to him by the company before the judgment was recovered. This case was very thoroughly considered, and is supported by an English case, which holds to the same effect. (4) In that case, Cockburn, C. J., said: "What answer is it for the shareholder to say: 'The company is indebted to me as well as to you'? The one party has a judgment against the company; the other a mere right of set-off." And Draper, C. J., in the *Macbeth* case, said: "Admitting, for argument's sake, the equity alleged to arise from *Macbeth's* position and dealings with the company to the fullest extent, I cannot understand that it is to prevail over a legal right conferred by an express statute." (5) Again, it was particularly pointed out in the Privy Council in *Ryland v. Delisle*, (6) that the creditor under the Act is in a different position to that of the company. Draper, C. J., who voiced the same idea in *Macbeth v. Smart*, said: "Smart does not derive the power or

(1) Per Lord Giffard, 6 Moore N. S. at p. 235.

(2) *Held*: that a shareholder of an insolvent railway corporation cannot offer a debt due to him by the corporation, whatever may be the character of such debt, in compensation to a claim made against him by the creditor of the company under C. S. C., cap. 66, § 80; *Ryland v. Routh*, 1 L. C. L. J. 114 (1868).

(3) 14 Grant Ch. 298 (1868).

(4) *Wyatt v. The Darent Valley Ry. Co.*, 2 C. B. N. S. 109.

(5) 14 Grant Ch. at p. 313.

(6) 6 Moore N. S. at p. 235.

right to have recourse for the payment of his debt to the shareholders by or through the company, for the statute does not give it to the company, but to their creditors. It is not, therefore, to my apprehension a sound view to treat him on the footing of an assignee of the company, deriving his rights only from them." (1) The reasoning and principle of *Macbeth v. Smart* were fully adopted by Gwynne, J., then of the Ontario Court of Queen's Bench, in the case of *Benner v. Currie*, (2) which was a still stronger case, for there defendant had himself recovered judgment against the company, on which a *feri facias* had been returned *nulla bona*. The court said that the plea formed no defence, for the plaintiff was not claiming in right of the company, but by virtue of a specific statutory remedy; and the decision of *Macbeth v. Smart* was in principle applicable, notwithstanding the fact of defendant having a judgment and execution. Again in *McGregor v. Currie*, (3) Hagarty, C. J., of the Ontario Common Pleas adopted the reasoning of both *Macbeth v. Smart* and *Benner v. Currie*, and also the Quebec case of *Ryland v. Delisle*. (4)

The latest case in which the prior Ontario decisions were referred to is that of *Field v. Galloway*. (5) But the court found that it was not necessary to discuss the principles of these decisions, for this was the case of an insolvent company which had made an assignment of all its assets to trustees, and was subject to the winding up Acts; and, further, the Ontario Act, governing the company, provided: "that any shareholder may plead by way of defence in whole or part any set-off which he could set up against the company." Rose, J., however, at the trial followed *Macbeth v. Smart*; though Wilson, C. J., sitting *in Banco* said: "It is not necessary to discuss upon what principles the case of *Macbeth v. Smart*, and other analogous cases referred to, were decided. I am inclined to think it will be found that, so far as they may be supposed to rest upon the application of the winding up Acts to them, they are not sustain-

(1) 14 Gr. Chy. at p. 314.

(2) 36 U. C. Q. B. 411 (1875).

(3) 26 U. C. C. P. 55 (1876).

(4) 3 L. R. P. C. 17.

(5) 5 O. R. 502; and see *Nasmith v. Dickey*, 44 U. C. Q. B. 414.

able, although they may be maintainable upon other grounds." But the winding up Acts do not apply to railway companies, and therefore we must so far consider the *Macbeth* case and its attendant cases to be undisputed to the present date.

Calls.

47. The directors may, from time to time, make such calls Directors may upon the respective shareholders, in respect of the amount of make. capital respectively subscribed or owing by them, as they deem necessary. (1) The enactment of a by-law to regulate the mode in which the calls shall be made is not imperative. Where no by-law exists, the calls may be made as prescribed by the directors. (2) Where a trading company incorporated by statute becomes insolvent, one of the partners, being also a judgment creditor, is entitled to a decree compelling the directors to make calls upon the stock of subscribers, notwithstanding a clause in the statute, declaring the shares of defaulters should be forfeited, the forfeiture being cumulative to all other remedies to which a creditor is entitled, (3) that is, so long as the powers granted by the special or general Act exist. (4) For example, section 89 of The Railway Act limits the time for the commencement and completion of the railway; and provides that, if those limits are exceeded, the powers granted by the special or general Act shall cease and be null and void as respects so much of the railway as then remains uncompleted. It would, therefore, appear that calls could not be made for the construction of the uncompleted part of the line where the conditions of section 89 have not been complied with. (5) The Legislature can, however, revive the company's powers in regard to the uncompleted portion of the line, by giving them through a special enactment a further

(1) Sec. 63.

(2) *The Rascony W. & C. Mfg. Co. v. Desmarais*, M. L. R., 2 S. C. 381 In Review.

(3) *Harris v. Dry Dock Co.*, 7 Grant's Chy. 450; see *Ryland v. De-lisle*, discussed on p. 60 *supra*.

(4) Where action is brought against a shareholder in an incorporated joint stock company, he may plead a non-compliance with its Act of incorporation, and that by reason of such non-compliance the company is not legally in existence. *The Que. & Richmond Ry. Co. v. Dawson*, 1 L. C. R. 366.

(5) *Dumble v. The Peterborough & Lake Chenning R.R. Co.*, 12 Grant Chy. 74.

time to execute their undertaking. And their powers can be thus revived after lying dormant for years, (1) but the stock first subscribed cannot be regarded as extinguished for non user. (2) Where such amended Act recites that it has been granted upon the prayer of the parties interested in the original Act, it must be taken upon the recital as conclusive that each individual interested in the original Act was concurring in the passing of the amended Act. (3)

Notices.

48. At least thirty days' notice, by publication in the manner indicated by section 41, shall be given of each call. (4) Section 41 states that a copy of the *Gazette* containing such notice shall, on production thereof, be evidence of the sufficiency of such notice. But it has been held (5) that a *Gazette* of the date of 28th May, containing a notice bearing date on the 15th of March of the same year, is not evidence that notice of the first call was given on the latter date;—that is to say, a *Gazette* cannot be considered as giving notice anterior to the date of its publication, nor as being evidence of any notice of an earlier date than the date of the *Gazette* itself. The statute under which this case was decided (6) is worded similarly to the above corresponding section of our present Act. (7)

No call shall be made at a less interval than two months from the previous call." (8) Calls made on the 1st September, 1st November, and 1st January are not within these requirements. (9) The months mentioned in the Act are of course calendar months. Between the day on which the call is payable and the

(1) *Toronto & Lake Huron R.R. Co. v. Crookshank*, 4 U. C. Q. B., p. 317.

(2) *Ibid.*, p. 322.

(3) *Ibid.*

(4) Sec. 63.

(5) *Buffalo, Brantford & Goderich Ry. Co. v. Parke*, 12 U. C. Q. B. 607.

(6) 14 & 15 Vic., cap. 51, sec. 16, ss. 24.

(7) It has been *held*: that proof that notices claiming payment of the call issued for were mailed to shareholders was sufficient evidence that such calls were made. *Ross v. Converse*, 27 L. C. J. 143, Q. B. 1883.

(8) Sec. 63.

(9) *Buffalo, Brantford & Goderich Ry. Co. v. Parke*, 12 U. C. Q. B. 607; *Port Dover & Lake Huron Ry. Co. v. Grey*, 36 U. C. Q. B. 425; *Toronto Gas Co. v. Russel*, 6 U. C. R. 567; *Stratford & Moreton Ry. Co. v. Stratton*, 2 B. & Ad. 518.

date of the next payment there must be a clear interval of two calendar months. (1) But directors may make more than one call by resolution of the board.

Provided always that no greater amount be called in any one year than is prescribed by the special Act. (2)

49. Every shareholder shall be liable to pay the amount of the Payment calls so made in respect of the shares held by him to the persons and at the times and places from time to time appointed by the company or the directors. (3)

Under an Act which required that stockholders should pay up their shares "by such instalments, and at such times and places as the directors of the said corporation shall appoint," it was held that, when the directors passed a resolution ordering a call, but omitted to specify the place of payment, and a notice, signed by the managing director "by order," was published, and a circular signed by him was sent to each shareholder, in which the place of payment was named, but there was no meeting of the directors between the passing of the resolution and the day named for payment, in an action for this call, the above omission was fatal. (4)

(1) *Ry. Sleepers Supply Co. (in re)*, 29 Ch. D. 204; *Clayes v. Darling*, 16 R. L. 649; *Port Dover & Lake Huron Ry. Co. v. Grey*, 36 U. C. Q. B. 425.

Plaintiffs, by their Act of incorporation, were authorized to call in the stock by instalments, as the directors should appoint, subject to a proviso that no instalment shall exceed 10 per cent., or be called for or become payable in less than 30 days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held.

Held, that the times fixed for the payment of instalments need not be 30 days apart, but that instalments might be made payable at any time, provided no call exceeded 10 per cent., and 30 days intervened between the date of notice of the call and the day on which it was payable.

That no instalment could lawfully be made payable in less than 30 days from the day for payment of the next preceding.

That notice of a call in one district published in a newspaper is sufficient to render the shareholders residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held. *Provincial Insurance Co. v. Worts*, 9 Ont. A.R. 56.

(2) Sec. 63.

(3) Sec. 65.

(4) *The Provident Life Assurance & Invest. Co. v. Wilson*, 25 U. C. Q. B. 53.

Payment by
note.

50. It was held in a New Brunswick case, (1) that a railway company may take, and recover on, a promissory note given for the amount of assessments due by a stockholder on his shares. This decision applies *a fortiori* to existing railways, because in that case the company had no express power to make or receive promissory notes, etc., whereas such power is expressly granted by the Dominion Railway Act. (2)

Forfeiture for
non-payment
of calls.

51. Every person who neglects or refuses to pay a ratable share of the calls, for the space of two months after the time appointed for the payment thereof, shall forfeit to the company his shares in the company, and all the profit and benefit thereof. (3)

No advantage shall be taken of the forfeiture, unless the shares are declared to be forfeited at a general meeting of the company, assembled at any time after such forfeiture has been incurred. (4)

(1) St. Stephens Branch Ry. Co. v. Black, 13 N. B. Rep. 140 ; and see Redfield, Vol. 1, p. 181, ed. 1888.

(2) Sec. 98.

(3) Sec. 80.

Held in accordance with Court of C. P., that the company were not restricted to the remedy by forfeiture, but might sustain an action against a shareholder upon calls to stock subscribed. Marmora Foundry Co. v. Jackson, 9 Q. B. 509, Ontario ; Marmora Foundry Co. v. Murray, 1 C. P. 1, 29, Ontario ; Marmora Foundry Co. v. Boswell, 1 C. P. 175, Ontario.

A non-borrowing member of a building society died intestate ; no one administered for 3 years, and during interval the shares of society ran in arrear, and the society during the interval declared them forfeited, and carried the amount to credit of profit and loss account. After the society was supposed to have been wound up and the assets distributed, letters of administration were obtained, and application was made to the society to be admitted as a member, and refused.

Held : 1. That the proceedings of the society to forfeit the shares in the absence of a legal representative were illegal ; 2. That the plaintiff (administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture and the procuring of letters of administration was no answer to the claim. Glass v. Hope, 14 Grant's Chy. 484 ; in Appeal, 16 Chy. 420.

See Harris v. Dry Dock Co., 7 Grant's Chy. 450.

(4) Sec. 81.

To a declaration for calls under section 10 of plaintiff's charter, 12 Vic., cap. 166, defendant pleaded that by non payment of said calls the shares became forfeited in pursuance of the statute, and that defendant acquiesced in such forfeiture of which plaintiff had notice. *Held* : bad, for defendant could not thus forfeit his shares. Ont. Mar. Ins. Co. v. Ireland, 5 U. C. C. P. 135.

Every such forfeiture shall be an indemnification to and for every shareholder so forfeiting, against all actions, suits, or prosecutions whatsoever commenced or prosecuted for any breach of contract or other agreement between such shareholder and the other shareholders with regard to carrying on the undertaking. (1)

The directors may sell, either by public auction (2) or by private sale, (3) and in such manner and on such terms as to them seem meet, any shares so declared to be forfeited, or may pledge such shares for the payment of loans or advances made or to be made thereon, or for the payment of any sums of money borrowed by or advanced to the company. Provided that authority for such purpose of the stock be first given at a special general meeting of the shareholders called for the purpose. (4)

Although the Act gives to the company power to forfeit shares for non-payment, yet this power cannot be exercised for the purpose of discharging stock subscribers from liability to creditors, in case the company should prove a failure. (5)

(1) Sec. 82.

The directors passed a resolution, declaring that the shares mentioned in a schedule intended to be annexed (but which was not annexed) to the resolution, which had become forfeited by non-payment of a call, should be sold at a certain date, unless previously redeemed, and the resolution for sale of the stock had not been acted upon by the company; in an action by a creditor against a shareholder on the forfeit list, it was held that the defendant was still liable as a shareholder.

Smith v. Lynn, 3 U. C., E. & A. 201, see p. 59 *supra*; see also *Fraser v. Robertson*, 13 U. C. C. P. 184.

(2) The shares of certain shareholders being forfeited by default to pay the calls due thereon were offered for sale by auction.

Held: that the omission to state in the notices of sale the amounts which had been paid on the shares in question did not affect the validity of the sale. *Gilman v. The Royal Can. Ins. Co.*, M. L. R., 1 S. C. 1.

(3) *Held*: (incidentally) that it is not absolutely necessary that forfeited shares should be sold by public auction. A sale made in good faith and for the advantage of the company will not be disturbed, more especially when the person who owned the shares does not complain thereof. *Gilman v. Robertson et al.* & the Royal Can. Ins. Co., M. L. R., 1 S. C. 11.

(4) Sec. 83.

(5) *Morawitz Corp.*, § 857; *Mills v. Stewart*, 62 Barb. 444.

Unissued Shares.

Sale of.

52. Section 83 also empowers the directors upon the authority of the shareholders to sell or pledge "any unissued shares," in the same manner as forfeited stock. The power to issue the stock so to be sold is given by the shareholders in a special general meeting convened.

This section would apparently authorize the directors to sell forfeited or unissued shares at a discount; but if so sold wrongfully or fraudulently, the directors would be liable in damages as for a breach of trust. (1) And the holders of such shares would be held liable for their full par value, not only to creditors, but on liquidation of the company to the ordinary shareholders on adjustment of their rights *inter se*. (2)

But even where a statute expressly prohibits corporations from selling their shares at a discount, the pledgee of stock can dispose of it at less than par. (3)

Paid-up Stock.

Issue of.

53. The directors may make and issue, as paid up stock, shares in the company, whether subscribed for or not, and may allot and hand over such stock in payment for right of way, plant, rolling stock or materials of any kind, and also for the services of contractors and engineers; and such issue and allotment of stock shall be binding on the company, and such stock shall not be assessable for calls. (4)

(1) *Hirsche v. Sims* P. C. 28 July, 1894; 10 Times L. R. 616.

(2) *In re*, Time Tables Publishing Co. (Welton's case), 10 T. L. R. 660. But see *Ooregum Mining Co. v. Roper* (1892) App. C. 125.

(3) *Peterborough R. R. Co. v. Nashua & L. R. R. Co.*, 59 N. H. 385.

(4) Sec. 39. And see p. 88 *infra*.

A company not registered under the Companies Act issued shares as "fully paid up," and also certificates of those shares, describing them as fully paid up, and made the annual returns giving them the same description. The company entered into a contract with G. to purchase a mill and machinery, part payment for which was to be made to G. in "fully paid up shares." They were not, in fact, fully paid up, and there was no contract with respect to them such as is required by the Companies Act of 1867, § 25. G. received the shares, and negotiated business with them, and gave B., from whom he had purchased property, and who accepted them, a part of purchase money in fully paid up shares. B., having bought some property from N., purchase money was paid by B. to N. through a solicitor who acted for both B. and N. The property in question was then conveyed at B.'s desire direct from N. to G.,

Dividends and Interest.

54. At the annual meeting of the shareholders of the company, Dividends. a dividend may be declared out of the net profits of the undertaking. (1)

Such dividend shall be at and after the rate of so much per share (2) upon the several shares held by the shareholders in the stock of the company, as such meeting thinks fit to appoint or determine. (3)

55. Net earnings are properly the gross receipts, less the Net profits, expenses of operating the road or other business of the corporation. what are. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go towards dividends, which, in that way, are paid out of the net earnings. (4)

and 200 shares held by G. were handed over to N., who, however, swore that he only received them as trustee for B. N's name was registered as holder of the shares on Company's books, and he at once sent a proxy to G. to vote at a general meeting, describing himself as a shareholder of the company. The certificates of these shares were given to B. himself. The company was ordered to be wound up. *Held*: that, under the circumstances, N. was not liable to be placed on the list of contributories in respect to the 200 shares. *Held*, also, that if shares are taken in the course of business for valuable consideration, on the person who asserts that he who took the shares has notice that they were not actually paid up, lies the burden of proof of that notice. *Burkinshaw v. Nicolls, L. R., 3 App. Cas. 1004, H. L. (E).*

(1) Sec. 69.

(2) The capital of a company incorporated under the Acts of 1862 and 1867 consisted of 60,000 shares of £1; 40,000 were fully paid up, and 20,000 to the extent of only 5s. per share. By the 71st Article of Association the directors may declare a dividend to be paid to the members in proportion to their shares. By the definition clauses, the word "capital" was declared to mean the capital for the time being of the company, and the word "shares" the shares into which the capital is divided. In a question whether the directors could competently recommend a dividend payable to each shareholder in proportion to the amount paid up on the shares held by him, *Held*: affirming the decision of the court below, that such a declaration of dividend was incompetent, because, upon the true construction of the articles of association read with the Act of 1862 and 1867, all the shares were entitled to participate equally in the dividend, without regard to the amount paid up upon each. *Oakbank Oil Co. v. Crum, L. R., 8 App. Cas. 65.*

(3) Sec. 70.

(4) *Blatchfield, J., in St. John v. Erie R.R. Co., 10 Blatch 271. Affirmed in the Supreme Court of the United States, 22 Wall (U.S.) 136.*

The word "liabilities" has been extended to embrace not only debts already matured, but those which exist but have not matured. Thus, where a corporation had on hand \$36,000, its floating debt was \$1,000, and the funded debt payable in seventeen years at 6 per cent. was \$75,000; the yearly current expenses, including interest on funded debt, was about \$10,000, and the corporation had no immediate need of the surplus on hand, or of its earnings, except to pay the current expenses; in an action by a stockholder to compel the corporation to declare a dividend, it was held that in such a case the court would not compel the directors to declare a dividend; (1) but if the directors, in the exercise of their discretion under such a state of facts, should declare one, the courts would not restrain its payment upon the ground that unmatured debts existed, especially where such debts have a considerable period to run, and there are no evidences of fraud; because the directors themselves are the best judges as to the state of the business of the corporation and its prospects for the future. (2) The above New York case was largely decided on the grounds of the American doctrine, that a corporation is the trustee of its creditors, but not of its stockholders, and that therefore the creditors have a better right to the funds which the corporation hold for them in trust.

The term "net profits" has been held to mean net earnings after deducting current working expenses, without including interest on money borrowed, (3) but a better definition is thought to be, that which remains after deduction of all charges and every outlay. (4) Profits have also been tersely defined by very high authority to be the incomings of a concern after deducting the expenses of earning them, (5) and perhaps the clearest and most accurate definition is that given by Kekewich, J., in a partnership case, (6) namely, that net profits is the sum divisible

(1) *Karnes v. Rochester, etc., R.R. Co.*, 4 Abb. Pr. (N. Y.) N. S. 107.

(2) *Wood Ry. Law* 167.

(3) *Corry v. Londonderry, etc., Ry. Co.*, 29 Beav. 263. *Brice, ultra vires* (Green), 195.

(4) *Cook, Stockholders* 546. Ed. of 1889.

(5) *Meisey Docks v. Lucas*, 8 App. Cas. 903.

(6) *Glasier v. Rolls*, L. R. 42 Ch. D. 453; and see *Birch v. Cropper* 14 App. Cas. 525. As to working out profit and loss account, see *Buckley Coy's* 486; and the remarks of the Lord Chancellor in *Mills v. Northern Ry. of Buenos Ayres*, L. R. 5 Ch. 621, 631.

after discharging or making provision for every outgoing properly chargeable against the period for which the profits are calculated. The power of settling questions of the kind is generally entrusted to the directors, with or without the sanction of the shareholders; but under sec. 54 the declaration of dividends in the case of railway companies is clearly the act of the shareholders. (1) Apart from the limit placed on all powers of directors and shareholders by the doctrine of *ultra vires*, if there be a difference of opinion the voice of the majority must prevail. (2)

56. The majority can decide whether a dividend shall be paid before some particular debt is discharged. (3)

But this is always subject to the liability of the directors in damages or otherwise for payment of dividends not justified by the profits or out of capital.

The directors, in their quality of administrators and trustees, are responsible to the company, its shareholders and creditors for all damages directly resulting from the payment of a dividend which diminishes the capital of the company; (4) and they are also responsible for the loss suffered by third parties, who, having nothing to guide them as to the state of the company and the value of its shares but the dividends paid, have been induced to buy stock at exaggerated prices, through the declaration of fictitious dividends, which, in fact, diminished the capital of the company. (5) But shareholders who attended the meetings when the dividends were declared, or who were notified to attend but did not do so, and who had or could have had communication of the statements and reports submitted by the directors would be estopped from maintaining an action of damages. (6)

(1) See *Re Denham Co.* L. R. 25 Ch. D. 763.

(2) *Lee v. Neuchatel Asphalte Co.*, 58 L. T. R. 553; *Rance's case*, 6 Ch. App. 104; *Lever v. Land Securities Co.*, 8 Times L. R. 94; *Lambert v. Neuchatel Asphalte Co.*, 30 W. R. 413.

(3) *Lindley Comp.* 429.

(4) *Montreal City & District Savings Bank v. Geddes*, 19 R. L. at p. 687 (S.C. Que. 1890).

(5) *Ibid.*

(6) *Ibid.* An application for an injunction enjoining the directors of a company not to declare a special dividend must be preceded by notice, and the affidavit in support of the application will be held insufficient if it merely alleges information and belief. *Kane v. Montreal Telegraph Co.*, 20 L. C. J. 120 (1876).

Liability of
directors for
payment of
dividends out
of capital.

Preference
shares.

57. Unless the contrary is declared by statute, charter, or express contract, all shareholders are entitled to equal rights as to dividends, and no class is entitled to any preference or priority over any other. Preference shares can only be created when the authority to create them is given by statute or charter. (1) "Guaranteed" and "preferred stock" stand upon the same footing, and are not entitled to a dividend unless it has been earned. (2)

(1) Lindley Comp. 396.

(2) Wood Railways, 176.

CHAPTER IV.

GENERAL POWERS.

1. *Limitation of time for commencement and completion of work.*
2. *Judicial interpretation of sec. 89.*
3. *Power of Lieut.-Govr. to cancel charter.*
4. *Extraordinary powers.*
5. *Surveys.*
6. *Maps and plans*
7. *Deposit of plan.*
8. *Notice of deposit.*
9. *Correction of errors or omissions.*
10. *Alterations in plan.*
11. *Construction of railway not to be proceeded with till plans made and deposited.*
12. *Further powers.*
13. *To receive gifts and bonuses.*
14. *To purchase, take and sell lands.*
15. *To carry railway across lands.*
16. *Deviation.*
17. *Branch lines.*
18. *To fell trees, cross, etc., railways.*
19. *To construct works on, across, or under railways, streams, highways, etc.*
20. *To divert streams and highways.*
21. *To make drains, conduits, etc.*
22. *To alter position of gas and water pipes, etc.*
23. *Proviso.*
24. *Telegraph and telephone lines.*
25. *To make and maintain railway.*
26. *To erect buildings, etc.*
27. *To exercise powers beyond International boundary.*
28. *To sell lands acquired from Crown or otherwise.*
29. *Proviso as to compensation for damages caused by exercise of powers.*

1. Before considering in detail the general powers of a railway company, it may be convenient to point out that under section 89 of 'The Railway Act, the construction of the railway must be commenced, and fifteen per cent. (1) of the amount of the capital stock must be expended, within two years (2) after the passing of the Act authorizing its construction ; and if the railway is not finished and put in operation within seven years (3) from the passing of the Act, the powers granted both under the special Act and the general Act are declared to be null and void with regard to so much of the railway as remains unconstructed at that time.

(1) Ten per cent., Que. Act, R. S. Q. 5176 (3).

(2) Three years, Que. Act, R. S. Q. 5176 (3).

(3) Ten, Que. Act, R. S. Q. 5176 (3).

Judicial interpretation of section 89.

2. It has been held in Quebec that the fact of not having expended the amount required within the specified time, nor commenced construction, does not *ipso facto* operate an extinction of the company nor the revocation of its charter, which could only be ordered at the suit of the Attorney General, and not on an injunction by a private individual. (1)

And by the House of Lords in an English case, where the company's charter provided that if the railway was not completed in 5 years its powers should cease, except as to so much as was completed, and the company had given notice to a land-owner of its intention to take certain property, but did nothing further until thirteen days before the expiration of the 5 years, and then, under the Lands Clauses Act, entered on the land, and proceeded to construct the railway thereon, it was Held, that whether the railway could or could not have been completed within the specified time, the entry on the land was lawful, and the company could not be restrained by injunction, but were entitled to remain, and complete the railway after the expiration of the 5 years. (2)

Power of Lieut.-Govr. to cancel charter.

3. By a recent Act of the Quebec Legislature (3) the Lieutenant-Governor has been given power, upon the report of the railway committee, to cancel the charter of any railway company

(1) *Roy v. La Cie. de Ch. de F. Q. M. & C.*, 11 L. N. 359; and see, *Re New York Elevated Ry. Co.*, 70 N. Y. 327.

(2) *Tiverton v. North Devon Ry. Co. v. Loosemore*, 9 App. Cases 480.

The P. & C. L. Ry. Co. had acquired certain land as part of their roadbed. In 1865 its charter expired, the road not having been put in operation. In 1856 an Act was passed, by which the road was to be sold at auction, the Act of incorporation revived, and the time for completing extended for 5 years. Within 5 years a conveyance was executed to defendant's company, which took possession, but which did not use the land till a short time before the suit. In 1872 the C. P. & M. R. & M. Railway filed a map and book of reference of a proposed extension of their line, and built part of their road, ceasing in 1873. In 1880 they leased to plaintiff company the land in question, and this action was to recover back possession.

Held, (affirming Court below) That the partial construction of the road by the C. P. & M. R. & M. Railway in 1872 was an act of trespass; that the defendant company, under the reviving Act and conveyance in pursuance thereof, acquired a title to the land; that the power to sell by order of the Court of Chancery was permissive merely; that the right to the land was not forfeited by non-completion of the work on the land within the five years, and therefore that the plaintiff company should not succeed. *Grand Junction Ry. Co. v. Midland Ry. Co.*, 7 O. A. R. 681. As to what will constitute a *bona fide* commencement of construction, see *Ont. & Sault Ste. Marie Ry. Co. v. C. P. R. Co.*, 14 O. R. 432.

(3) R. S. Q. 5183 (a) 56 Vic. c. 36, s. 2.

which has not complied with the terms of its charter as to commencement and completion of the works within the prescribed time, or has become insolvent, or is unable to proceed with the works, or for any other cause which, *in the opinion of the Lieutenant-Governor, is sufficient to justify such cancellation.* (1)

4. In order that a company may be enabled to construct and operate a railway, the Legislature by The Railway Act has given extraordinary powers, including the power of eminent domain, (2) which powers will be found enumerated in section 90 of the Act. (3)

5. The preliminary steps necessary for the construction of a railway are the taking of surveys, and the making of plans of the road or line of the railway, as authorized by the Act of incorporation; and in order that the company may be enabled to do so, they are authorized by this section of the Act to enter upon not only the lands and property of all individuals and corporations, but also the property of the Crown, without leave or license, and make surveys, examinations, or other necessary arrangements for fixing the site of the railway, and determining what portion of the lands will be required for the purposes of the railway. (4)

6. Having made the surveys as authorized by the Act, the company are required to make a map or plan of the route of the railway, and a profile showing the variations in level along the line and the course and direction of the railway, and also the lands which are intended to be taken for the railway. This is called the location plan, and the company are required to attach to it a book of reference, setting out a general description of the properties which they intend to take, and the names of the owners or occupants as far as they can be ascertained, and

(1) The fear of the exercise of such an arbitrary power by the Government has caused some Quebec railway companies to place themselves under the jurisdiction of the Dom. Act.

(2) Except. See sec. 119.

(3) R. S. Q. 5132.

(4) Sec. 90 (a).

Damage caused by a preliminary survey is prescribed in six months under sec. 27 of Cap. 109, R. S. C. *Ravary v. Ont. & Que. Ry., M. L. R., 5 S. C. 54.* Now one year 51 Vic. Cap. 29, s. 287.

any other details which may be necessary to make the plan clearly understood. (1) As a matter of practical working, these plans generally show by a distinctive color the extent of property intended to be taken, designating the land of each different owner by a separate number for each lot, called the location number, and indicating the measurement and superficial contents; and the book of reference is a sort of index of the whole.

Deposit of
plan.

7. The plan and book of reference and profile have to be deposited in the Department of Railways, (2) and it is there examined and certified by the minister (3) or by his deputy; and the company is required to deposit copies in the registry office of each district or county through which the railway is to pass of such parts of the plan as relate to the locality. (4)

Notice of
deposit.

8. Notice must be given in at least one newspaper in each district or county of the deposit. (5) These copies of plans are open to public inspection; (6) and the deposit and notice are declared by section 145 to be a general notice to all parties of the lands which will be required by the railway; and the compensation for lands taken and damages is ascertained with reference to the date of such deposit. (7)

Correction of
errors or
omissions.

9. Should errors and omissions occur in these plans, and in the description of the lands or their owners, it is provided that any omission, mis-statement or erroneous description of either the lands or owners or occupants may be corrected by two justices (8) on application after ten days' notice given to the owners of the land. (9) The justices have power to certify as to the errors

(1) Sec. 123.

(2) Public Works R. S. Q. 5163 (2).

(3) Commissioner R. S. Q. *ib.*

(5) Sec. 144.

(4) Sec. 125.

(6) Sec. 126.

(7) Held, (affirming Ferguson, J., 12 O. R. 624, that in ascertaining the compensation to be made to a land owner for land expropriated for a railway under R. S. C., cap. 109, § 8, the value of the part taken (as well as the increased value of the part not taken, which by subsec. 21 is to be set off) must be ascertained with reference to the date of the deposit of the map or plan and book of reference under subsec. 14, and therefore such value should include an increase which may have been caused by or is owing to the contemplated construction of the railway. *James v. Ont. & Que. Ry. Co.*, 15 O. A. R. 1 (1887).

(8) Judge of Superior Court, R. S. Q. 5163 (5).

(9) Sec. 128.

or omissions, and their certificate is deposited with the registrar with whom the plan has already been deposited, and the company are authorized to make the railway in accordance with the correction contained in the certificate. (1)

10. Again it may happen that alterations from the original survey or plan have to be made. In such case the company are bound to make a map and profile of these alterations on the same scale as the first map, and in the same form and containing the same particulars, and (2) deposit it in the same way with the registrar of the particular locality affected by the alteration. (3)

11. These are the preliminary steps to the construction of the railway, for until these have been completed, that is to say, until the location plan and book of reference have been made and deposited in the manner already mentioned, the construction of the railway cannot be proceeded with, (4) and if alterations have to be made in the plan, the construction of that portion of the railway affected by the alterations cannot be proceeded with until the deposit of the altered plan. (5) If, however, the company are authorized to construct their railway in sections, they are not bound to file plans of the whole railway before commencing work on any one section. (6)

12. Having complied with the provisions of the law as regards the surveys and plans, the company may now proceed to exercise the further powers given it under the Act for the construction of the railway, and it is proposed to here indicate, generally, the powers which are given to the company, and afterwards to explain, in detail where necessary, how they may be exercised.

13. Under section 90 the company may receive voluntary gifts of lands or other property for the purposes of the railway, and

(1) Sec. 129. (2) After approved by Legislature, R. S. Q. 5163 (7).

(3) Sec. 130.

(4) See *Corp. of Parkdale v. West, L. R., 12 App. Cas. 602*; also the *Kingston & Pembroke Ry. Co. v. Murphy, 17 S. C. R. 582, 12 L. N. 115*. See chapter on Eminent Domain.

(5) Sec. 131. See *Beauharnois Junction Ry. v. Bergevin, 17 R. L. 113 (Q. B. Que., 1889)*, and *Brooke v. Toronto Belt Line Ry. Co., 21 O. R. 401*.

(6) *Ont. & Sault Ste. Marie Ry. Co. v. C. P. R. Co., 14 O. R. 432*.

bonuses of money, or bonds, or debentures, or any other benefit given for the purpose of assisting in the construction of the road or its maintenance and operation; but the same may be held and used only for the purposes of such grants or donations. (1)

To purchase,
take and sell
lands.

14. They may purchase, take and hold of and from any person, any lands or property necessary for the construction or maintenance of the railway, and they are given power to sell or dispose of, in any way, so much of the property as is not required for the purposes of the railway. (2)

(1) Par. (6).

(2) Par. (c).

The plaintiff conveyed lot 83 to the defendants in 1847, expressing in the conveyance that the same had been selected by the company "for the purpose of establishing the western terminus of their road thereon," "and the execution of which condition constituted the sole consideration for this grant."

When plaintiff made this grant he knew that one H. had conveyed the adjoining lot No. 84 on substantially the same conditions. A passenger station was built on 83, and a freight house partly on 83 and partly on 84, which were used until defendants built a passenger station about $\frac{1}{2}$ mile from original one.

On a bill to restrain the removal of the western terminus from the land in question to the city of Detroit.

Held, reversing Spragge, C., that the terminus and depot were not confined to buildings alone, but extended to the whole premises necessary for conducting the business of a terminus, and that upon the true construction of the deed the plaintiff was only entitled to have lot 83 included in the terminus, and had no right to have all the buildings or any particular building on lot 83.

Held, that, even if the deed were read as requiring the establishment of buildings on the lot in question, that duty had been sufficiently complied with by their erection. *Geauyeau v. G. W. Ry. Co.*, 3 O. A. R. 412.

The plaintiff agreed with the contractors for the construction of a railway to convey to them in fee simple 6 acres, to be increased to 10 if necessary, in consideration of their placing the station for the town of Prescott thereon. After the road had been surveyed and the station buildings erected on the property, the plaintiff executed a conveyance thereof to the contractors, which contained a covenant by them to continue and maintain the station on those lands from thenceforth; but the deed was never executed by the grantees. The company continued to use such station for about 10 years, when they removed it to a distance of one and a half miles.

Held, reversing the judgment of the Court below (28 Gr. 583), that the Act of the company in thus placing and using the station was a substantial compliance with the agreement, and that they were not bound to continue that station there for all time. *Jessup v. G. T. Ry. Co.*, 7 O. A. R. 128.

Held, that a promise of sale followed by actual possession was equivalent to an absolute sale, and an hypothecary claim created against the vendor subsequent to such promise of sale was inoperative as against the property sold. *Gosselin v. G. T. Ry. Co.*, 9 L. C. R. 315, Q. B.

If an agreement to take and pay for land made by the directors of a railway company before the passing of an Act, to authorize a work which is the

15. They may construct and carry the railway across the lands of any person on the line as located, or within one mile of the located line under the general Act, or at such further distance from the line as they may be sanctioned to do by their special Act. To carry railway across lands.

16. Under Quebec Act they cannot deviate even one mile unless authorized by the special Act. Deviation. (1) But under the Dominion Act they may change the location of the railway with approval of the railway committee, in order to lessen a curve or reduce a gradient, or otherwise to benefit the railway, "or for any other purpose of public advantage." All the provisions of the Act apply to the part so changed. But no company shall extend beyond its termini fixed by the special Act. (2)

subject of that agreement, is valid, its validity will not be affected by the fact that a part of such agreement relates to compensation for annoyance, which cannot happen if the land itself is not required to be taken.

And an agreement by which directors bind themselves in the event of their Bill passing to take land for the purpose of making the railway, and to pay for it within three months after the passing of the bill, is valid, and its stipulations become enforceable after the passing of the Bill. *Taylor v. Chichester & Midland Ry. Co.*, L. R., 4 E. & I. App. 628.

Occupation of land by the company without the proprietor's formal consent, or without the formalities required by the Act, gives to the latter right to an opposition *afin de distraire*. *Brewster v. Mongeau*, 15 R. L. 67 (Q. B. 1887), M. L. R., 3 Q. B. 20.

Where a railway company takes possession of land for the purposes of their road, with no other permission from the proprietor than that, if they do so, "it will be at their own risk;" the proprietor may, even after a lapse of several years, recover back the land from the company, so long as no indemnity has been paid for it. *Brewster v. Mongeau* and the M. & S. Ry. Co. 31 L. C. J. 115 (Q. B. 1887).

(1) R. S. Q. 5163 (11).

(2) Sec. 120. The provision contained in section 19 of the Consolidated Ry. Act 1879, that no railway company shall have any right to extend its line of railway beyond the termini mentioned in the special Act, is inconsistent with the power given to the Canadian Pacific Ry. Co., under section 14 of their contract to build branch lines from any point within the Dominion, and with a declaration in section 15 in the charter, that the main line, branch lines and any extensions of the main line thereafter constructed or acquired shall constitute the Canadian Pacific Railway Company; following this holding, it was held, that in the particular case the C. P. R. Co. had a right to build their road beyond Port Moody in B. C., the terminus mentioned in their Act of incorporation. *Can. Pac. Ry. Co. v. Major*, 13 S. C. R. 233; 9 L. N. 410, 1887.

A company built its line to a terminus mentioned in the charter, and then wished to extend it less than a mile in the same direction. The time for the completion of the road had not expired, but the company had terminated the representation on the board of directors, which by statute was to continue during construction, and had claimed and obtained from the city of K. exemption from taxation on the ground of completion of the road.

Branch lines.

17. Branch lines, not exceeding six miles in length, may be constructed for the purpose of connecting any city, town, village, manufacture or mine, quarry, spring or well, with the main line or any branch, or with any railway worked or leased by the company, or for the purpose of giving increased facilities to business. (1)

Before proceeding to locate or construct any such line, more than one-quarter of a mile in length, the company must give six weeks' public notice, in a newspaper in the county affected, of their intention to apply to the railway committee (2) to sanction the building and the appropriation of lands therefor under the compulsory powers of the company. (3) The company must deposit a plan and book of reference in the registry office of the places affected; and the plan must be approved by the railway committee after the last publication. The order approving limits the time within which such branch line is to be constructed, not to exceed two years. (4)

Every such company may, for any such purpose, exercise all the powers given to it with respect to its main line, and each and every provision of the general and special Acts, which is appli-

To effect the desired extension, it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute.

Held, that the proposed extension was not a deviation within the meaning of the statute 42 Vic., cap. 9, sec. 8, §§ 11 D. That the road authorized was completed as shown by the acts of the company, and upon such completion the compulsory powers to expropriate ceased; and per Gwynne, J., that as the time limited by the charter for the completion of the road had not expired, the company could still file a map or plan shewing the lands in question, and acquire the land under sec. 7, subsec. 19, of 42 Vic. cap. 9. *Kingston & Pembroke Ry. Co. v. Murphy*, 17 S. C. R. 582, 12 L. N. 115.

Where a railway company were authorized to construct their line "from" the City of Ottawa to, etc., it was held that they had the right to enter the city and construct from a point within its limits. *Re Bronsdon et al. & the City of Ottawa*, 1 O. R. 415. And so also where the company were authorized to construct a railway "by way of" Montreal, etc. *Evans v. Atlantic & N. W. Ry. Co.*, S. C. Mont. 23 May, 1887.

(1) Sec. 121.

(2) Lieutenant Governor R. S. Q. 5132 (17).

(3) Sec. 121.

(4) *Ibid.*

cable to such extension, shall extend and apply to every such branch line of railway. (1)

Under the Quebec Act, branch lines not exceeding 6 miles in length may be built from any terminus or station of the railway, on obtaining from the local municipality a by-law sanctioning the same; but lands cannot be taken for such purpose without the consent of the owners. Such branches are not subject to the restrictions as to quality and construction of the main line contained in the charter or general Act. (2)

18. The company may for the purposes of construction cut down any trees within six rods from either side of the railway. (3)

To fell trees,
cross, etc.,
railways.

19. They may construct the railway across any other railway at any point on its route, or cross, intersect, join and unite their

To construct
works on,
across, or under
railways,
streams, high-
ways, etc.

(1) Sec. 122.

Under special reference of the disputes between the Northern Ry. Co. and the town of Barrie, as to the construction of a branch line into the town, it was held, that the directions of the arbitrator, as to the conveyance of certain lands by the company and a release of their claims as to other lands, were authorized, and the latter not objectionable for omitting to state to whom it was to be made; and that as to the amount awarded, if, as contended, the corporation could obtain no damages beyond what they had expended in procuring the land, it should be assumed no more was given. *Corp. of Town of Barrie & Northern Ry. Co.*, 22 U. C. Q. B. 25.

(2) R. S. Q. 5132 (16). (N. B. This clause is not contained in the Dominion Act.)

(3) Sec. 90 (e). Railway companies, in exercising this right, and causing damage thereby, may plead that this right forms part of the damages to be covered by the compensation awarded to the person whose land is expropriated, and he has no action to recover any additional amount for the value of trees within this limit which may be cut down and removed by the company. *Evans v. A. & N. W. Ry. Co.*, M. L. R., 6 S. C. 493.

The defendants, a railway company, incorporated under an Act of the Parliament of Canada, built their line through land owned by the Crown, but which was under a timber license from the Ontario Government.

The defendants cut down and removed the timber both within and outside the six rod limit, mentioned in subsec. 12 of sec. 6 of the R. S. C., cap. 109.

Held, that under the subsection, the timber cut within the six rods became the property of the railway. *McArthur v. The Northern & Pacific Junction Ry. Co. & Hendrie et al.*, 15 Ont. R. 733.

railway with any other railway, (1) subject to the provisions of the Act to which attention will be called later.

To divert
streams and
highways.

20. They may even interfere with other railways, with tramways, canals, highways, (2) rivers, or streams which the railway intersects or touches, to the extent of constructing in or upon them, across, or under them, temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences, (3) provided always, be it understood, that these are necessary for the purpose of the railway, and subject to special provisions in certain cases.

In the case of rivers, streams and highways, the company may divert or alter, either temporarily or permanently, their course, or raise or sink their level, as may be required. (4)

(1) par. (f). Arbitration as to crossing under sec. 9, subsec. 15, cap. 165 R. S. O. Appeal therefrom, etc., etc., *Vide* C. V. Ry. Co. v. G. W. Ry. Co., 4 O. A. R. 532.

(2) See G. T. Ry. v. Miville, 14 L. C. R. 469 (Q. B. 1864), p. 83 *infra*.

A street railway company was authorized to lay its track "along the highways in the parish of M.," leading into the streets of the city.

Held, that the company, in laying its track inconveniently close to the property on one side of the highway, and thus apparently favoring the property on the other side, had not exceeded its powers, and an action for the abatement of the nuisance was dismissed. *The Atty. Gen. v. The M. C. P. Ry. and The Trustees of the M. Turnpike Roads*, 1 L. N. 580, S. C. 1878.

Where works, for the construction of a railway authorized by Statute, passing in the street of an incorporated town, injure the property of an individual, his action of damages will lie against the railway company and not against the municipal corporation. *Lambert & The Corporation of Three Rivers*, Q. B., *Ramsay's Digest* 221; 10 R. L. 359 Q. B. *The City of Three Rivers v. Lessard*, 10 R. L. 441, Q. B.

Municipalities alone have the right to sue for removal of obstructions and encroachments on the public streets, and individuals have no right of action in the premises unless in the case of real and special damage incurred by them. *Bourdon v. Bernard et al.*, 15 L. C. J. 60, Q. B. 1870.

(3) Par. (g). And see sec. 183 *et seq.* as to highways; and *Vide Atty. Gen. v. The M. C. P. Ry. Co. and The Trustees of the Turnpike roads*, 1 L. N. 580, 1878; *Lambert v. Corp. of Three Rivers*, 10 R. L. 359, Q. B.; *Ramsay's A. C.* 221; *Bell v. The City of Quebec*, L. R., 5 App. Cas. 84; *Regina v. G. T. R. Co.*, 15 U. C. Q. B. 121; *In re Day & Town of Guelph*, *ibid.* 126; *The Caledonian Ry. Co. v. Walkers Trustees*, L. R., 7 App. Cas. 259; *Fleming v. The Newport Ky. Co.*, L. R., 8 App. Cas. 265; *Ricket v. Metropolitan Ry. Co.*, L. R., 2 E. & L. App. 175; *Corporation of Parkd. v. West*, 12 App. Cas. 602.

(4) Par. (h).

21. Besides taking the lands they may require for the railway, To make drains, conduits, etc. they have the right to make drains or conduits in or through lands adjoining the railway, for the purpose of conveying water either to the railway or from it. (1)

22. And where drains or sewers, or water or gas pipes, or To alter position of gas and water pipes, telegraph, telephone or electric light wires or poles, interfere in any way with the construction or operation of the railway, the company may divert them or alter their position. (2)

23. Whilst having the right to exercise these powers of Proviso. division and alteration with regard to rivers, streams and high-ways, and water and gas pipes, drainage, or telegraph, telephone or electric light wires or poles, the company are required to restore the same as nearly as possible to their former state, or at all events to put them in such a state as not to materially impair their usefulness. (3)

24. The powers of the company include also the right to Telegraph and telephone lines. construct or acquire electric, telegraph and telephone lines for the purposes of its undertaking. (4) Railway companies under the Dominion Act have not the power to construct or acquire telegraph or telephone lines for commercial business, that is to say, for the transmission of messages for the public; their powers in this respect can be exercised only for the purposes of the railway, unless specially authorized by the special Act. But under the Quebec Act, (5) they have the power to establish telegraph lines along the whole extent of the railway, which lines may be used by the public generally, under such rules and regulations as the company may fix.

(1) Par. (2). In an action of damages by reason of plaintiff's land being overflowed in consequence of neglect of company to keep ditches on each side of railway in proper order.

Held, in appeal, that as the ditches in question had been cut by defendants to carry off surplus water, and were so cut as to conduct the water into a watercourse running through plaintiff's land, which was thereby flooded, and damage caused, that defendants were liable notwithstanding the rule of law "that he who, in the construction of any work upon his property, uses his right without violating any rule of law or of usage or title or contrary possession is not held for the damage resulting therefrom. The G. T. Ry. Co. and Miville, 14 L. C. R. 469, Q. B. 1864.

(2) Par. (7).

(3) Sec. 91.

(4) Sec. 90 (m).

(5) R. S. Q. 5176.

To make and maintain railway.

25. In addition to the powers mentioned, the company are authorized, as a matter of course, to make and complete their railway, and to alter it and to keep it in repair; and the railway may be worked by any mechanical power, either steam, electricity or the atmosphere, or by animals, or by any combination of them. (1)

To erect buildings, etc.

26. They may also erect and maintain all the buildings, stations, depots, wharves, etc., (2) that are required for the railway, and construct the engines, cars and other machinery necessary for the working of their railway and the accommodation and use of their passengers, freight and business, or acquire the same by purchase; (3) and as a result of the foregoing powers, they are further given power to carry passengers and goods on the railway, and to fix the time and manner in which they shall be carried and the tolls and compensations for such carriage. (4) and from time to time alter, repair, or discontinue the before mentioned works or any of them, and substitute others in their stead. (5) Then comes a wide and general clause empowering the company to do all other acts necessary for making, maintaining or altering or repairing and using the railway. (6)

To exercise powers beyond International boundary.

27. In 1890 Parliament extended these powers, so that any company operating a railway from any point in Canada to any point on the International boundary line may exercise beyond such boundary the powers which it may exercise in Canada, in so far as they are permitted by the laws in force there. (7)

(1) Sec. 90 (k).

(2) *Vide*, London, Brighton & South Coast Ry. Co. v. Truman, L. R., 11 App. Cas. 45.

Under sec. 46 C. 109 R. S. C. railway companies are bound to pay for damages caused by the erection of snow-sheds, where the damage is caused to the property itself on which the sheds are erected, and diminishes its value. Action for such damages can be taken by the owner of the land, although not in possession. *Sanche v. C. P. R. Co.*, 16 R. L. 296.

(3) Par. (l).

(4) Par. (o).

(5) Par. (p).

(6) Par. (g). Where it was alleged that the G. T. Ry. Co. were carrying on the business of carters by conveying freight to and from the city and their depot, to the detriment of the public and carters of Montreal. Held, the company had power to employ particular carters exclusively for so collecting and delivering freight, and that this was not a violation of their charter, but was essential or at least incidental to their business as common carriers, and fell within the meaning of the Act respecting railways (C. S. C., c. 66, § 8), and that an injunction would not lie. *The Atty. Gen. v. The G. T. Ry. Co.*, 16 L. C. R. 91.

(7) § 3 Vic., c. 28.

28. And by the same Statute as amended by 55-56 Vic., cap. 27, railway companies were given power to acquire, sell or otherwise dispose of lands obtained from the Crown or any corporation or other party.

29. Whilst the Legislature has given railway companies these extensive powers, it has at the same time endeavored to protect the public in every possible way, as we will have occasion to point out later; suffice it for the moment to call attention to the general provision contained in the Act, that the company shall, in the exercise of their powers, do as little damage as possible, and make full compensation in the manner provided therein, and in the special Act, to all parties interested, for all damage by them sustained by reason of the exercise of such powers. (1) It is not convenient to discuss at this point the meaning and extent of this clause. It is sufficient to here point out that the compensation which it is provided railway companies shall make for damage caused in the exercise of their powers is the statutory compensation provided by the Legislature to be recovered in the manner thereby fixed. And any further reference at the present to this subject may be concluded by the observation that, in the opinion of the author, the only remedy of the party suffering damage caused by railway companies in the lawful and proper exercise of their corporate powers, under authority of Parliament, is that provided by Statute; but for damage caused by the fault or negligence of railway companies or their servants, in the exercise of these powers, the party suffering has his recourse at common law. (2) This is a wide subject, which will have to be more fully considered when we come to treat in detail of the liability of railway companies for damages caused in the exercise of the various powers conferred upon them by Statute.

(1) Sec. 92.

(2) *Rex v. Pease*, 4 B. & Ad. 30; *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679; *Reg. v. Chester*, 33 L. J. Q. B. 251; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Brand v. Hammersmith Ry. Co.*, 4 H. L. at pp. 196 and 215; *London & Brighton Ry. Co. v. Truman*, 11 App. Cas. at pp. 45 and 61; *National Telephone Co. v. Baker*, 3 R. 318; C. C. 1053-54.

CHAPTER V.

FINANCING OF RAILWAY COMPANIES.

1. *Payment of right of way, plant, contractors, etc., by issue of paid-up stock.*
2. *Preferred stock.*
3. *Increase of stock.*
4. *Subsidies and bonuses.*
5. *Issue of promissory notes and bills.*

BONDS, DEBENTURES, ETC.

6. *Issue of, authorization of shareholders.*
7. *Time and place of payment.*
Rate of interest.
8. *Form.*
9. *Sale and pledge.*
Purpose to be applied to.
10. *Limit of issue must not be exceeded.*
11. *Re-issue.*
12. *Restriction of powers (now removed).*
13. *Mortgage deed.*
14. *Bonds a first claim.*
15. *Trustees for bondholders.*
16. *Bondholders mortgagees.*
17. *Interest.*
Coupons.
18. *Bondholders' position.*
19. *Powers of bondholders.*
20. *Transfer.*
21. *Jurisprudence.*
22. *Power to borrow and mortgage.*
23. *" give lien on railway and alienate lands.*
24. *Power to alienate franchise.*
25. *Sale of railway.*
26. *Bonds, a first charge on the undertaking, etc.*
27. *Undertaking.*
28. *Tolls and income.*
29. *After acquired property.*
30. *Vendor's lien.*
31. *Rolling stock—part of realty?*
32. *Rails and other supplies.*
33. *Formalities in making and issuing bonds—waiver.*
34. *Directory requirements as to formalities.*
35. *Stolen bonds.*
36. *Pleading want of formality.*
37. *Payee not mentioned.*
38. *Debentures negotiable instruments.*
39. *Coupons and interest thereon.*
40. *Place of presentment and payment.*
41. *Suit upon coupons.*
42. *Transfer and registration of bonds.*
43. *Default.*
44. *" At the next general meeting."*
45. *" Raising money."*
46. *" Best terms and conditions."*
47. *Distinction between pledge and deposit as collateral security.*
48. *Extent of borrowing power—condition precedent.*
49. *Excessive borrowing power cured by subsequent Act.*
50. *Company not restricted to bonds alone as security for monies borrowed.*

TRUSTEES.

51. Failure to act.
52. Rights of bondholders to protect their interests.

53. Notice.
54. Trustees as common carriers.
55. Who are trustees.
56. Distinction between mortgage and hypothec under the civil and common law.

1. Before considering the general powers of railway companies that are to be exercised under the Statute, we must consider what are the financial means of which the company may avail itself in order to obtain the necessary funds for the purpose of the construction and operation of the road. First of all, there is the capital stock, which the directors have the power to call in, in the manner already mentioned. (1) The money thus obtained can only be used for the payment of the cost of the preliminary expenses of the company, the making of surveys, plans and estimates, and the construction, maintenance, operation and other purposes of the railway generally. (2)

There is also the means provided by sec. 39 for the payment for right of way, plant, rolling stock or materials of any kind, and the services of engineers and contractors, by the issue of paid-up stock. (3)

(1) *Supra*, p. 63.

(2) Secs. 33 and 35.

Vide *Cohen v. Wilkinson*, 12 Beav. 138, 1 Mac. & G. 481; *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare 111, 2 Mac. & G. 389; *Hodgson v. The Earl of Powis*, 12 Beav. 392, 529; *Graham v. Birkenhead, etc., Ry. Co.*, 2 Mac. & G. 146.

(3) See page 68 *supra*. An agreement between a person to take, and a company to give, fully paid shares, in payment for property or services, is not satisfied by the company allotting shares not fully paid up any more than a contract for cotton would be satisfied by the company supplying bark. (*Bowen L. J.*, 1887.) *Arnot's case*, *re* *Barangah Oil Refining Company*, L. R., 36 Ch. D. 711; *Anderson's case*, 7 Ch. D. 75; 1 Ch. D. 124.

Thus where directors had agreed to transfer fully paid-up shares into A's name as security for an advance, the court held that they had no power to put A on the register for part-paid shares. *Ashworth v. Bristol Ry. Co.*, 15 L. T. R. 561. The company does not fulfill its contract in such a case unless it issues fully paid-up shares, which will be recognized as such in law. If it omits to make them so by registering a contract, neither the company nor its liquidator can enforce the contract. *Arnot's case*, 36 Ch. D. 702. But see *re* *London Celluloid Co.*, 39 Ch. D. 190.

The allottee is in such case entitled to repudiate the shares. *Re Addlestone Linoleum Co.*, 37 Ch. D. 191; *Mudford's claim*, 14 Ch. D. 634; *ex-parte* *Appleyard*, 18 Ch. D. 587.

Where a company had agreed to pay for a concession in fully paid-up

Payment of right of way, plant, contractors, etc., by issue of paid-up stock.

Preferred stock.

2. The company may also raise money for the purpose of the undertaking, by the issue of what is called preferred stock.

By preferred stock is generally understood stock upon which the dividends, at a certain fixed rate, are guaranteed by the company and are paid in preference to the dividends upon the common stock,—that is to say, that a holder of preferred stock is entitled to be paid a dividend at the rate specified, out of the net profits of the company, before any holder of common stock is entitled to any payment of dividends. In the absence of

shares, but, on account of the vendor's alleged delay in handing over the concession, the company had registered him as a holder of the shares as unpaid, the court ordered the register to be rectified, the company to enforce any claim it might have against the vendor in the usual way. *Ex-parte Wilson, re Foreign Gas Co.*, W. N. 1874, 139.

A transferee of vendor's shares allotted as fully paid-up (but not in cash or under a registered contract) is in no better position than his transferor, and will be treated in the winding-up as the holder of unpaid shares, if the company has done nothing to mislead the transferee. *Crickmer's case, re Carribeau Co.*, 44 L. J. Ch. 595; affirmed, 10 Ch. App. 614. *Blyth's case, re Heaton Steel & Iron Co.*, 4 Ch. D. 140. But see *re British Farmers' Pure Linseed Cake Co.*, 7 Ch. D. 533, affirmed, 3 App. Cas. 1004, explaining *Blyth's case*.

If a vendor transfers paid-up shares to a director to qualify him, the director, though liable for a breach of trust, cannot be treated as the holder of unpaid shares. *Carling's case*, 1 Ch. D. 115.

Where a contract to allot shares as fully paid-up has been registered, the registration enures to the benefit of the nominee of the allottee. *Kirby's case, re Dominion of Canada Plumbago Co.*, 46 L. T. R. 682; following *Carling's case*.

If a company has registered an allottee as holder of shares fully paid-up, or issued certificates representing the shares as paid-up (though in fact there has been no payment in cash or registered contract), it will be estopped by such admission, and likewise will the liquidator, as against a transferee without notice, from saying that the shares are not paid-up in cash. *Nicolls's case, re British Farmers' Pure Linseed Cake Co.*, 7 Ch. D. 533. Affirmed (H. L.) *sub. nom. Burkinshaw v. Nicolls*, 3 App. Cas. 1004; *re London Celluloid Co.*, 39 Ch. D. 190, 205.

And this title by estoppel the transferee may pass even to a person who has notice that the shares have not been paid-up; *e.g.*, an officer or solicitor of the company. *Barrow's case*, 14 Ch. D. 432; commented on *re London Celluloid Co.*, *supra*; *Turpin's case*, W. N. 1870, 77. And see, *re A. W. Hall & Co.*, 37 Ch. D. 712.

But the doctrine of *Burkinshaw v. Nicolls* does not apply where transferee can be proved to have had notice, express or constructive, that the shares were not in fact paid-up; the burden of such proof is on the liquidator. *Re London Celluloid Co.*, 39 Ch. D. 190; *re Halifax Sugar Refining Co.*, W. N. 1891, 2, 29; *re New Chile Gold Mining Co.*, W. N. 1892, 103. Nor does this doctrine apply where the shares are taken not on the faith of the company's certificate, but upon representations made by the directors. *Re Vulcan Iron Works Co.*, W. N. 1885, 120; *ex parte Sandys, re Railway Publishing Co.*, 42 Ch. D. 98.

special legislative authority, preferred stock cannot be issued without the consent or acquiescence of the holders of the ordinary or common stock of the company. (1) By consent is meant their lawful consent given at a meeting properly called for the purpose; but the term "acquiescence" has a much wider meaning. It has been held by the courts in New York that a holder of common stock, who had not expressly consented to the issue of preferred stock, but who had allowed the stock to be issued and preferential dividends paid thereon without taking action, could not afterwards validly attack the issue of the stock. (2) It must be always understood that preferred stock cannot be issued beyond the amount of the capital stock, authorized by the charter of the company, without special legislative authority therefor; or unless the capital is increased as indicated in the next paragraph.

3. The original capital stock of the company may be increased, with the approval of the Governor in Council, (3) to ^{Increase of stock.} any amount, (4) but this increase must be sanctioned by the vote of the shareholders holding at least two-thirds of the subscribed stock of the company, at a meeting specially called for that purpose by the directors, by notice delivered to each shareholder personally, or properly directed to him and deposited in the post office at least twenty days previous to such meeting, and this notice must state the time, place and object of the meeting, and the amount of the proposed increase. (5) Of course this increase of capital stock may be either in the form of common stock or preferred stock, and it is, especially in the United States, a favorite method of raising money for the purpose of the company, to make such subsequent issue preferred stock. Under our Act, it would seem that this increase of capital stock is subject purely to the approval of the Governor in Council; (6) but where the increase is allowed, as in many of the States, upon the mere sanction of the shareholders, in meeting assembled, it has been frequently held that such increase could not be made

(1) *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358; *Matthews v. Great Northern Ry. Co.*, 28 L. J. Ch. 375.

(2) *Hoyt v. Quicksilver Mining Co.*, 17 Hun. 169.

(3) Not required by Quebec Act.

(4) Sec. 37.

(5) Sec. 37.

(6) *Ibid.*

until the whole of the original capital stock had been subscribed and paid-up. This would seem to be consonant with logic and reason, and it is doubtful whether an increase of stock would be authorized by the Governor in Council here, unless it was shown that the whole of the original capital stock had been subscribed and paid-up, and that it was necessary and proper for the purposes of the company to obtain a further amount of money by an increase of the stock.

Subsidies and
bonuses.

4. In addition to this, railways are frequently assisted by public money granted by way of subsidies by the Legislature by grants of public lands, and by bonuses from municipal corporations. (1)

(1) An act of the Legislature of Canada having provided that a railway company should be entitled to 4,000,000 acres of the waste lands of the Crown on completion of their road, and a proportionate quantity of such lands on completion of 20 miles of the line: Held, that a petition of right presented to the Lieutenant Governor of Ontario, addressed to Her Majesty, was the proper proceeding for the purpose of enforcing the claim of the company against the Province. *Can. Central Ry. Co. v. The Queen*, 20 Gr. Chy. 273.

A by-law of the defendant corporation, providing for the delivery of debentures to a railway represented by the plaintiffs as a bonus to aid them in constructing their railway, having been adopted by a vote of the rate-payers, was read a second and third time, and passed by the council, but was neither signed nor sealed because a month had not elapsed from its first publication, the notice required by 36 Vic., c. 48, s. 231, ss. 3, to be appended to the copy of the by-law as published, having stated that the by-law would be taken into consideration after a month.

Subsequently a motion to read the by-law a second and third time was lost. Later on after election of new council it was finally passed, signed and sealed. The railway company were bound to begin within three years and to finish the road within eight years, which they failed to do within the time.

Held (affirming 8 O. R. 201) that the plaintiffs were not in a position to enforce the delivery of the debentures after the lapse of nine years from the passing of the by-law, when a total change of circumstances had taken place, and when the period fixed by plaintiff's charter for the completion of the railway had expired. *Canada Atlantic Ry. Co. v. The Corporation of the city of Ottawa*, 12 O. A. R. 234, affirmed in Supreme Court, 12 S. C. R. 365.

In consideration of the bonus granted by the plaintiffs to the defendants, the latter agreed: (1) To bring their railway from Ingersoll to some point on the line of the Southern Railway, not more than $\frac{1}{2}$ mile east of the present passenger railway station of the Canada Southern Ry. Co. at St. Thomas; and (2) to run all their passenger trains to and from a small station on Church street. The defendants performed the first part of the agreement, and also the second, as long as the Canada Southern Ry. Co. permitted the use of their line from the point of junction to the small station on Church street; but on the refusal of the other company to continue this privilege, the defendants discontinued the performance of this part of their agreement.

5. Besides these means of obtaining money, the directors have power to borrow money in various ways. The company, acting

Issue of promissory notes and bills.

Held, that this was not a case in which defendants should be directed specifically to perform their contract as to the Church street station, but that the plaintiffs were entitled to a reference as to damages for breach thereof. *The Corporation of the city of St. Thomas v. The C. V. R. Co.*, 15 O. R. 673, and in Appeal, 12 O. A. R. 273.

A by-law of the defendant municipality provided that on the completion ready for running of the E. & H. Ry. from Chatham to the C. S. Ry. crossing, by a named day, and the construction and completion within two years from the date of such by-law of the whole track and road, with stations, freight sheds, sidings at such crossing and upon the completion of a bridge across the Thames, and the complete construction of the road in other respects to the satisfaction of the Commissioner of Public Works, and upon the company running said road with all necessary accommodations for the public for one week, the defendants should forthwith, within 2 years from the day the by-law took effect (30th Dec., 1882), deliver to the E. & H. Ry. Co. debentures to the amount of \$30,000. By an agreement made prior to the passing of the by-law, the company covenanted with the defendants amongst other things to run the road when completed, and to build a station at or near the corner of Colborne and William streets, and in consideration thereof the defendant agreed to submit the by-law. Upon an action by the assignee of the E. & H. Ry. Co. to compel delivery of the debentures, the defendants counter-claimed for damages for breach of agreement and for a specific performance. The engineer named by the commissioner of P. W. granted a certificate as to completion of the work. The defendants claimed the right to have continuous use of the station "at or near the corner of Colborne and William streets" enforced by the Court.

Held, affirming *Cameron, C. J.*, that the certificate of the engineer established a sufficient performance coupled with the fact that the road had actually been run for a week, that the covenants in the agreements were independent, and non-compliance would not be a valid defence to the demand; but that under the agreement and by-law the station formed part of the general undertaking, and the obligation could not be limited to its mere construction as separate from its use, and defendants were entitled to specific performance as respects such station; and that there should be reference to ascertain the damages of the defendants on their counter-claim.

Held, also, that any objections to the by-law were cured by its registration under 44 Vic., c. 24, § 28, no action to set it aside having been taken within three months, and that the Statute applied although the debentures had not been issued. *Bickford v. Chatham*, 14 O. A. R. 32. Affirmed in Supreme Court with minor differences, 16 S. C. R. 235.

A by-law to aid a railway company by \$75,000, was introduced into the county council of Peterborough. The by-law was read twice only, and was subsequently voted on by rate-payers. When the voting took place there was no power in the municipality to grant a bonus, but subsequently an Act was passed, declaring the by-law as valid as if it had been read a third time, and that it should be legal and binding as if passed after the Act. The company subsequently notified the council to send the debentures to trustees appointed under an Act 34 Vic. (Ont.), c. 48, and the council next year formally repudiated all liability under the by-law by notice, and had collected no money or made a sinking fund.

The company until seven years later made no demand for debentures and then applied for a mandamus to compel delivery to the trustees.

Held, that the effect of the Statute passed 34 Vic. (Ont.), c. 48, apart

by the president, or vice-president, or any other officer authorized by the by-laws of the company, may become a party to promissory notes, or bills of exchange, countersigned by the secretary

from any effect it might have of recognizing the existence of the railway company, was not to legalize the by-law in favor of the company, but was merely to make it valid as if read a third time, or as if the municipality had power to give a bonus to the company, and there being certain defects in the by-law not cured by the Statute, the appellants could not recover the bonus from defendants. *The Grand Junction Ry. Co. v. The Corporation of County of Peterborough*, 6 S. C. R. 76. *Privy Council*, judgment maintaining, but on other grounds. *Vide L.R.*, 13 App. Cas. 136.

Under 44-45 Vic., c. 40, § 2 (P. Q.), passed on a petition of the Quebec Central Railway Company, after notice given by them asking for an amendment of their charter, the town of Levis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for right of way for the extension of their railway to deep water, over and above \$30,000. The appellants (rate-payers of Levis) applied for and obtained an injunction to stay further proceedings on this by-law on the ground of illegality.

The proviso in section 2 of the Act under which the corporation of the town of Levis contended that the by-law was authorized is as follows: "Provided that within thirty days from the sanction of the present Act the corporation of the town of Levis furnishes the said company with its said guarantee and obligation to pay all excess over \$30,000 of the cost of expropriation for the right of way."

By the Act of incorporation of the town of Levis, no power or authority is given to the corporation to give such guarantee. The Statute 44-45 Vic., cap. 40, was passed 30th June, 1881, and the by-law 27th July following.

Held (reversing Q. B.), that the Statute in question did not authorize the corporation of Levis to impose burdens upon the municipality which were not authorized by their Acts of incorporation or other special legislative authority, and therefore the by-law was invalid and injunction sustained. *The Quebec Warehouse Co. v. the Town of Levis*, 11 S. C. R. 666.

Held, by Supreme Court affirming judgment of Q. B., that a debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to said debentures free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the future keeping up of the road. Article 962 Municipal Code. L. C. *Parish of St. Cesaire v. MacFarlane*, 14 S. C. R. 738.

A municipal corporation under authority of by-law issued and handed to the Treasurer of the province of Quebec \$50,000 of its debentures as a subsidy to a railway company, the same to be paid over to the company in the manner (and subject to the same conditions) in which the Government provincial subsidy was payable under 44-45 Vic., cap. 2, § 19, when the road was completed and in good running order, to the satisfaction of the Lieutenant Governor in Council. The debentures were signed by S. M., who was elected warden, and took and held possession of the office after W. J. P. had verbally resigned the position.

In an action by the railway company to recover from the Treasurer of the Province the \$50,000 debentures after the Government bonus had been paid, in which action the municipal corporation was *mis en cause* as a co-defendant, the Provincial Treasurer pleaded by demurrer only, which was over-ruled, and

for amounts not less than \$100. (1) Notes and bills of exchange so drawn and signed are binding upon the company without the necessity of having the seal of the company affixed, and it is provided that every such note or bill of exchange shall be presumed to have been made with proper authority until the contrary is shown. (2) But the company is of course not authorized to issue any note or bill payable to bearer, or intended to be circulated as money or as the note or bill of a bank. (3)

Bonds, Debentures, Etc.

6. The directors may also, under the authority of the share-^{Issue of,} holders given at a special general meeting of the shareholders, ^{authorization} called after due notice as required for any special meeting of the ^{of share-} company, provided that two-thirds in value of the subscribed ^{holders,} stock of the company is represented at the meeting by qualified

the County of Pontiac pleaded general denial and that the debentures were illegally signed.

Held, that the debentures signed by the warden *de facto* were perfectly legal.

That as the Provincial Treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieutenant Governor in Council, the onus was on the municipal corporation *mis en cause* to prove that the Government had not acted in conformity with the statute. Corporation of County of Pontiac v. Hon. J. G. Ross, 17 S. C. R. 406.

In consideration of a bonus granted by the plaintiffs, the W. G. & B. Ry. Co. covenanted: "To erect and maintain a permanent freight and passenger station at G." Shortly afterwards the road was leased, with notice of this agreement to the defendants, who discontinued G as a regular station, merely stopping there when there were any passengers to be let down or taken up.

Held, affirming the decree of Spragge, J., 25 Gr. 86, that the mere erection of station buildings was not a fulfillment of the covenant, and that the municipality was entitled to have it specifically performed. The corporation of the township of Wallace v. The G. W. Ry. Co., 3 O. A. R. 44.

(1) Sec. 98.

(2) Ibid. Sec. 5 of 16 Vic., cap. 241, gives power to the Midland Ry. Co. to become parties to bill, and enacts: "Any bill of exchange drawn, accepted or endorsed by the president of the company, with the counter-signature of the secretary of the company, and under the authority of a quorum of a majority of the directors, shall be binding on the company," etc., etc. *Vide* report of case and Act. A bill of Exchange addressed to the President Midland Railway, Port Hope, was accepted as follows:—"For the Midland Railway of Canada. Accepted, H. Read, Secretary; Geo. A. Cox, President;" the latter being then the president of the company. *Held*, affirming O.B. (44 U. C. R., 542), That the defendant Cox was personally liable (Patterson & Morrison, J. J. A., Diss.). Madden v. Cox, 5 O. A. R. 473.

(3) Sec. 98.

shareholders, (1) issue bonds, debentures, or other securities, signed by the president or other presiding officer, and countersigned by the secretary. (2)

The issue of these bonds is subject to the provisions contained in the general Act, and to any special provisions which may be contained in the charter of the company.

Time and
place of pay-
ment.
Rate of
interest.
Form.

7. They may be made payable at such times and places, and in such manner, and may bear such rate of interest, not exceeding six per cent., as the directors may think proper. (3)

8. They are generally issued in printed form, and it is provided that the signatures to the bonds or debentures may be engraved. (4)

Sale and
pledge.
Purpose to be
applied to.

9. These bonds or debentures may be issued, sold or pledged by the directors, at the best price and on the best terms and conditions that they can obtain, for the purpose of raising money for the prosecution of the undertaking, (5) but none of these debentures may be for a less sum than \$100. (6)

Limit of issue
must not be
exceeded.

10. It must be remembered that if any limit is fixed by the special Act, the amount of bonds or debentures to be issued must not be exceeded. (7)

Re-issue.

11. The power of issuing bonds is not exhausted by the total authorized issue, but may be exercised from time to time upon the bonds constituting such issue being withdrawn or paid off and cancelled. (8)

Restriction of
powers (now
removed).

12. Previous to the passing of 55-56 Vic., cap. 27, the issue of bonds or debentures was prohibited until 20 per cent. of the cost had been actually expended on the work; but by that Act this restriction has been removed.

Mortgage
deed.

13. These bonds or debentures are secured by a mortgage deed, by which a mortgage and lien may be created upon the

(1) No restrictions under Quebec Act as to meeting, etc., company may borrow and issue bonds, etc., and hypothecate the lands, tolls, etc., of the company as security. R. S. Q. Art. 5132 (11).

(2) Sec. 93.

(3) Sec. 93.

(5) Ibid., ss. 2.

(7) Ibid., ss. 4.

(4) Ibid.

(6) Ibid., ss. 3.

(8) Ibid., ss. 4.

whole of the property, assets, rents and revenues of the company, both present and future, as may be described in the deed; (1) but the rents and revenues of the railway are subject in the first instance to the payment of any penalty imposed for non-compliance with the requirements of the Act respecting returns to the minister, and next to the payment of the working expenses of the railway, which payments take precedence of the rights of the holders of the bonds. (2)

By the mortgage deed, any powers, rights and remedies may be given to the bondholders or the trustees, not inconsistent with the provisions of the Act, or the holders may be restricted in the exercise of any power, privilege or remedy granted by the Act. (3)

14. These bonds or debentures so issued constitute a first ^{Bonds a first claim.} preferential claim and charge upon the property of the company, and its franchises, tolls, income, rents and revenues, and all property of every kind and description after the satisfaction of the payments just mentioned. (4)

15. By the mortgage deed securing the bonds or debentures, ^{Trustees for bondholders.} trustees are appointed, in whose favor, as representing the holders, all the property, revenues and franchises of the company are mortgaged;

16. And each holder of the bonds is deemed to be a mortgagee ^{Bondholders mortgagees.} *pro rata* with all the other holders, but no proceedings can be taken by law or under the Act to enforce payment of these bonds, or the interest upon them, except through the trustees appointed by the mortgage deed. (5)

17. The interest on these bonds is generally made payable ^{Interest.} semi-annually, at a fixed date, and detachable coupons are affixed ^{Coupons.} to the bonds, which are generally made payable to bearer, either at the office of the company or more generally at some bank. (6)

(1) Sec. 94.

(2) Ibid.

(4) Sec. 95.

(3) Ibid., ss. 2.

(5) Ibid., ss. 2.

(6) Article 1069 of the Civil Code applies to the coupons of bonds, and interest runs on such coupons from the dates they respectively fall due, without proof that the debtor was put in default otherwise than by the mere lapse of time. *Desrosiers v. M. P. & B. Ry.*, 28 L. C. J. 1, in Review 1883. As to the validity of bonds issued when the conditions imposed on the

Bondholders'
position.

18. It will be seen at once that by means of the issue of bonds and debentures such as these, the company is given a very important means of raising money for the purposes of its undertaking; and the holders of the bonds are secured by the mortgage upon the property and franchises of the company; (1) and are put in a better position than the shareholders themselves, inasmuch as the holders of the bonds take precedence of all other creditors, and the shareholders are only entitled to be paid after the creditors' claims have been satisfied.

Powers of
bondholders.

19. The powers of the holders of the bonds in the case of non-payment of principal or interest are, that at the first annual general meeting of the company, after default has occurred in paying the principal or interest on any of the bonds, and at all subsequent meetings, the holders have the right to vote, and to be elected as directors, in the same manner as shareholders would, (2) that is to say, that they have the same number of votes as shareholders, holding an equivalent amount of stock. But these rights, be it observed, cannot be exercised unless it is so provided by the mortgage deed, nor unless the bonds or debentures have been registered in the name of the holder, in the same manner as the shares of the company are registered, at least ten days previous to the meeting at which the holder claims to exercise his right to vote; (3) but the company are bound, on demand, to register such bonds, and the bonds are thereafter transferable in the same manner as the shares of the

railway company have not been substantially fulfilled. See *The Corporation of the City of Quebec v. The Quebec Central Ry. Co.*, 10 S. C. R. 563. *Bickford v. Grand Junction Ry. Co.*, 1 S. C. R. 696; *Cassils Dig.* 423, *infra*, p. 97.

(1) A holder of railway bonds has the right by conservatory process to prevent rolling stock which is hypothecated for the payment of the bonds from being removed from the road. *Wyatt v. Senécal*, 4 Q. L. R. 76, also 1 L. N. 98.

In an action between a preferential bondholder and the company, the Court cannot adjudicate with respect to priority of hypothec or lien of such bondholder, nor in such action can the Court declare that the road rolling stock, etc., are not susceptible of sale by the sheriff. *Morrison v. G. T. Ry. Co.*, 5 L. C. J. 313, S. C. 1861.

(2) Sec. 96. See *The M. P. & B. Ry. Co. & The Hochelaga Bank*, 27 L. C. J. 164, Q. B. 1883.

(3) Sec. 96, ss. 2.

capital stock. (1) The bonds so issued by the directors may be payable either to order or to bearer. (2)

20. They are generally made payable to bearer, and in such case are transferable by delivery, that is to say, transferable from hand to hand without endorsement, unless they are registered as just mentioned; but once registered they are only transferable by written transfers upon the books of the company in the same manner as shares in the capital stock. (3)

21. Having stated the clauses of the Act with regard to the powers of the company as to mortgaging property, the issue of bonds and similar securities, and the rights of the holders under the Act, it may be convenient to consider some of the more important judicial decisions bearing upon questions which have arisen under the Act or similar provisions of other Acts.

22. An important case involving the power to mortgage, arising under similar provisions of a former Railway Act, is that of *Bickford v. Grand Junction Ry. Co.* (4) The Grand Junction Ry. Co. having statutory authority to borrow money, issue bonds or other securities, to hypothecate the lands, tolls, and other property of the company, and to sell or dispose of property required for the purposes of the company, entered into an agreement with a contractor for building its road, by which the contractor was to receive in payment certain municipal and other securities, and the balance in the first mortgage bonds of the company, upon the completion of the work. After building a portion of the road, the contractor was unable to procure iron for it, and the railway company, to enable him to obtain it, made a mortgage, to one Buchanan, as trustee, of a portion of its road, to secure the payment to the Bank of Montreal of the notes of the contractor given for the price of the iron; providing however, that, in case of his failure to pay the notes, the mortgagee's sole recourse should be against the property and not against the company. The vendors of the iron retained a lien upon it until it should be laid upon the track. The contractor, after laying a

Power to borrow and mortgage.

(1) Sec. 96, ss. 2.

(2) Sec. 97.

(3) Sec. 97.

(4) 1 S. C. R. 696.

small part of the iron, became insolvent, and a large quantity of the iron which had been delivered to him, but which had not been laid upon the road, was sold by vendors at a large loss upon the price at which the iron was purchased. The holders of the mortgage on the railway then sought to enforce it for the value of the iron actually laid upon the track, as well as for the loss resulting from the re-sale of the iron. The railway company, while not objecting to paying the price of the iron actually placed upon the road, objected to paying the loss arising from the re-sale, and contended that the mortgage was *ultra vires*.

The Court of Appeal of Ontario started with the principle, that without express legislative authority a mortgage of the corporate property of a railway company could not be made; and from this deduced the conclusion, that a mortgage, to be effectual, must be within the terms of the authority given to create it. The only authority this company had to mortgage its property was given to secure the repayment of money borrowed for the purpose of completing or maintaining the road; whereas the debt secured by the mortgage in this case was that of the contractor. The mortgage was a pledge, by way of collateral security, that the contractor should pay his own debt; and the Court regarded such a mortgage as beyond the power of the company, and invalid, even if assented to or ratified by every stockholder. The court also declared that, inasmuch as the authority given to the company was to mortgage its property, tolls and revenues, the company could mortgage only the whole undertaking, and that a mortgage of a portion of the line which the company was constituted to build was void. (1)

On appeal from the judgment of the Court of Appeals of Ontario, the Supreme Court of Canada reversed this judgment and held the mortgage valid. (2) The court laid down the proposition that every corporation has the power to mortgage its property for the purposes of the undertaking, unless this power be limited by its charter or by statute; although such limitation may be deduced either from the object of the corporation being limited to certain specific things, or from its property being subject

(1) 23 Grant's Chy. 302.

(2) 1 S. C. R. 696.

to charges or trusts in favor of the public, with which a mortgage would be inconsistent. (1)

The Statutes, however, confer express power to mortgage the company's property for the payment of loans and debentures. This statutory power to mortgage for a special purpose does not restrict the general power of the company incidental to its existence to deal with its property by way of mortgage.

The mortgage, moreover, was within the scope of the powers conferred upon the company to construct and work a railway and to alienate and to dispose of lands for that purpose.

"The rails, for the price of which the mortgage was given, were indispensable to enable the company to carry out its undertaking. The company might have purchased them directly from the vendors. It was found more convenient, however, to make a contract for the construction of the railway, by which the contractor undertook to furnish the iron.

"Having power to give a mortgage to secure the price of rails, it can make no difference that they have given the mortgage as sureties for the contractor, and not as direct purchasers. Indirectly, it is given to secure the price of the rails.

"Had the mortgage been given for any object foreign to, or inconsistent with, the purposes of the incorporation, then, no doubt, it would have been *ultra vires* of the company. A familiar instance of a railway company exceeding the limits of its undertaking is afforded by a well-known case, in which such a corporation added to its legitimate business that of a line of steamships. Had this mortgage been given in aid or furtherance of any similarly unauthorized enterprise, it would, of course, have been *ultra vires*; but it is manifest that such was not the case here, and that the sole object of the corporation was to attain the end for which it had been created." (2)

Furthermore, the mortgage cannot be considered wholly void when it creates a good charge upon any part of the company's property, although it includes franchises and property which may be so impressed with a trust in favor of the public that it is beyond the power of the company to deal with them.

(1) Per Strong, J., at p. 730.

(2) Strong, J., at pp. 732-33.

Conceding, say the court, that the mortgage, if confined to the franchise and to the railway and its adjuncts, would have been void as being a charge on subjects *extra commercium*, it does not follow that it may not be a good charge on the other lands over which the company had power of free disposition, and for that reason alone the order of the court below should be reversed. (1)

Power to give
lien on rail-
way and alie-
nate lands.

23. The case of *Bickford v. Grand Junction Ry. Co.* was recently followed in the case of *Charlebois v. The Great North West Central Ry. Co.*, (2) which decided that it was *intra vires* of a railway company to give a contractor a lien and first charge on the part of the railway which he constructed, and that a railway company has a general power to give securities for purposes within the scope of the power conferred upon the company to construct and operate the railway, unless this power is expressly negatived in the Act of incorporation, and express power to borrow, and give specified securities, will not exclude the general power. (3)

Mr. Jones, in his work on railroad securities, disapproves of the judgment in *Bickford v. Grand Junction Ry. Co.*, in that, conceding its correctness as applied to the case in hand, it contains some propositions and reasoning regarding the power of railway companies to alienate lands, not in accordance with the best English and American authorities. (4)

But the present Dominion Railway Act (as amended by 53 Vic., cap. 28, and 55-56 Vic., cap. 27) contains provisions authorizing a company to alienate, sell, and dispose of the lands obtained by them from the Crown, or given to them by any corporation or other party, for the construction, maintenance, accommodation and use of the railway. It is true that by section 90, par. (c) of that Act, the power to alienate and dispose of lands purchased is restricted to so much thereof as is not necessary for the purposes of the road. But by par. (s) added by the amending Acts, the power to sell or otherwise dispose of lands obtained either from the Crown, corporations, or persons, seems unlimited.

(1) 1 S. C. R. at p. 737.

(2) 9 Man. 1.

(3) And see *Win. & H. B. Co. v. Mann*, 7 Man. 81.

(4) § 10.

However, the above decision goes the length of holding that the express power to borrow and to give the securities specified by the Statute will not negative or exclude the general power the company has to dispose of lands and give other securities for purposes within the scope of the powers conferred upon the company to construct and operate the railway. (1)

24. The right to be a corporation is not of course susceptible of alienation by mortgage or otherwise, and this is recognized in The Railway Act, under sections 278-280. The franchise mentioned in article 95 means such of the company's franchises or privileges as will enable the grantee to have the same use and beneficial enjoyment of the property which the company itself had. (2)

Power to
alienate fran-
chise.

The question debated by Strong, J., in *Bickford v. Grand Junction Ry. Co.* (3) as an open one, viz., as to whether a railway can mortgage or otherwise charge its franchise and undertaking, is now set at rest by section 95 of The Railway Act.

Where the railroad passes into hands of persons not having the necessary corporate powers to operate it, special leave must be obtained by act of Parliament to do so. (4)

25. It has been recently held in Ontario, (5) that, so long as a railway is a going concern, bondholders have no right, where interest on their bonds is in arrears, to seize, or take, or sell, or foreclose any part of the property of the company. Their remedy is by the appointment of a receiver.

Sale of
railway.

The reasoning in this case was based upon, among others, the leading English case of *Gardner v. London, Chatham & Dover Ry. Co.*, (6) which appears to rest upon the consideration that, inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties and obligations from a railway corporation to any other person, whether individual or

(1) And see *Charlebois v. G. N. W. C. Ry. Co.*, 9 Man., at pp. 12, 13.

(2) Per Strong, J., in *Bickford v. Grand Junction Ry. Co.*, 1 S. C. R. 737-738.

(3) *Supra*, p. 99-100.

(4) Sec 278 et seq; *ubi supra*, p. 4.

(5) *Phleps v. The St. Catharines & Niagara Central R. R. Co.*, 19 O. R. 501; *Galt v. Erie, etc., Ry. Co.*, 14 Grant Chy. 499.

(6) L. R., 2 Ch. 201.

corporate, it would be contrary to the policy of the Legislature, as disclosed in the general railway statutes, and in the special acts incorporating railway companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or of preventing its completion.

However, it would appear by sections 278-280 of our Act, that Parliament distinctly contemplated the sale of a railway at the suit of a bondholder or under any other lawful proceeding, and its subsequent operation by the purchaser under licence from the Minister of Railways, or under corporate powers granted by Parliament; and also the closing of the railway, or its being otherwise dealt with, as the Railway Committee might determine on the purchaser's failure to obtain such powers.

It is difficult to see, in view of these provisions of the Act, how the reasoning upon which the Phelps case was arrived at could be sustained. And in *Redfield v. Corporation of Wickham* (1) the Privy Council decided that under the Canadian railway statutes a railway may be taken in execution and sold, like other immovables, in ordinary course of law. This decision was apparently overlooked in the Phelps case, as pointed out by Bain, J., in *Charlebois v. G. N. W. C. Ry. Co.* (2)

In Quebec the right to seize and sell a railway by ordinary process of law has always been recognized, (3) and is endorsed by the decision of the Privy Council in *Redfield v. Corporation of Wickham*; (4) though this case seems to have turned somewhat upon the special provisions of the railway company's charter.

The railway may be seized and sold by ordinary process of law, even though subsidized by the Provincial Government. (5) But held by the Court of Appeals of Quebec, that a railway may not be sold in part, and is an indivisible thing, and can

(1) 33 L. J., P. C. 170.

(2) 9 Man. 11.

(3) *Morrison v. G. T. R. Co.*, 5 L. C. J. 313; *Corporation of Co. of Drummond v. South Eastern Ry. Co.*, 24 L. C. J. 276; *Hochelaga Bk. v. M. P. B. Ry. Co.*, 4 L. N. 333; *Ontario Car Co. v. Que. Central Ry. Co.*, 10 L. N. 12.

(4) 33 L. J., P. C. 170.

(5) *Wason Mfg. Co. v. Levis & Kennebec Ry. Co.*, 7 Q. L. R. 330, S. C. R. 1880 reversing.

only be sold as a whole. (1) This decision would not apply in the case of the sale of a part of a railway under the Dominion Act, which distinctly contemplates the sale of any section of a railway. (2)

26. Bonds issued under the present Railway Act are a first preferential claim and charge upon the company and its franchise, undertaking, tolls and income, rents and revenues, and real and personal property at any time acquired. (3) This secures everything to the mortgagees but the company's right to be a company; and upon non-fulfilment, by the company, of the terms of the deed, the mortgagees can come in under the deed of trust and, through the trustees appointed thereunder, take possession of and operate the road for their own benefit. (4) For the deeds of trust now in general vogue allow the trustees to take possession of the road, upon a certain default on the part of the company, and operate it, and after a further delay, if necessary, to acquire the absolute right to the railway.

Bonds, a first charge on the undertaking, etc.

27. While the word "undertaking" used in the section taken alone would not *prima facie* include the lands of the company, it does not necessarily exclude them. (5) "The word is ambiguous, and may be construed as meaning the speculation generally, or possibly it may be taken to include the land itself." (6) This point is further illustrated by the case of the *New Brunswick and Canada Atlantic Ry. Co.* (7) By various acts of the Imperial and local governments, this company was entitled to grants of a large amount of land not connected with or necessary for the completion of the railway.

The undertaking.

This land the company had taken as a land company, with the object of making it a source of profit by sale and otherwise. It issued debentures, mortgaging to each holder the undertaking, and all monies to arise from the sale of lands and all future calls,

- (1) *Stephen v. Banque d'Hochelaga*, M. L. R., 2 Q. B. 491. (Q. B. 1886).
 (2) Sec. 278; provided it be sold as an integer. (*Redfield v. Corporation of Wickham*, 33 L. J., P. C. 170).
 (3) Sec. 95.
 (4) Sec. 95, ss. 2.
 (5) *Myatt v. St. Helen & R. G. Ry. Co.*, 2 Q. B. 364.
 (6) *Coleridge, J.*, in same case at p. 374.
 (7) *Wickham v. N.B. & C. A. Ry. Co.*, L. R., 1 P. C. 64.

and all tolls, rolling stock, etc. ; provided, that nothing therein contained should be held to limit the power of sale or appropriation by the company of any of its lands, nor constitute a charge upon them. Certain judgment creditors of the company issued execution against the land of the company, whereupon the debenture holders, in order to protect the lands of the company and restrain a sale of the lands by the judgment creditors, instituted a suit in the Supreme Court of New Brunswick, and obtained an order appointing a receiver.

A motion for an injunction having been refused by one of the judges, and, upon appeal, again refused by the Supreme Court of Judicature of the Province, an appeal was taken to the Privy Council, which affirmed the decree of the Provincial Court.

Lord Chelmsford, delivering the judgment of their Lordships, said (1) that the proviso was not inconsistent with the sweeping and general terms of the debentures, but merely explanatory of them. "It seems clear to their Lordships that the lands not being in terms granted by the mortgage debentures, the proviso makes the intention of the parties perfectly clear, that no general expression used in the grant was intended to comprehend them, and therefore that the debenture holders are not entitled to interfere with the sale of the lands under the execution issued by the judgment creditors. But the debenture holders insist, that if they cannot stop the sale of the lands, they are entitled under the terms of the debentures to all the money arising from such a sale. It is quite clear, however, that the sales contemplated by the grant are those which are to be made by the company in the course of their regular operations. The judgment creditors take what belonged to the company, but do not take under them, and a sale by the sheriff under an execution is a sale by law, and not by the company.

"It is clear upon the whole case, that the lands of the company did not pass to the mortgagees under the debenture, nor are they entitled to the proceeds of the forced sales." (2)

A mortgage of the undertaking and all the real and personal estate has been held in England to include all the personal estate

(1) At p. 79.

(2) At p. 80.

then existing, but not personalty subsequently acquired. (1) But the Railway Act provides that the bonds, etc., are to be a charge upon all the real and personal property, at any time acquired. (2)

28. The earnings of a railway, while it is allowed to remain in the possession of the company, are not subject to the lien of the mortgage, although in terms the mortgage covers the tolls of the road, if at the same time the mortgage implies that the company is to hold possession and receive the earnings of the road until the mortgagee takes possession. (3) Thus, where a railway company executed to trustees a mortgage of its road, property and franchises, "together with the tolls, rents and profits to be had, gained or levied therefrom"; and the mortgage provided that after default continued for a certain period, the trustees might enter and take possession; but that until such time the company should have the sole right of possession, use and management of the mortgaged premises; the mortgagees subsequently commenced a suit to foreclose the mortgage, but did not take possession of the property or ask for the appointment of a receiver in the suit. Pending the suit, a creditor of the company obtained judgment against it, and attached in the hands of an agent of the company monies belonging to it received from the sale of passenger tickets and for freight charges. A receiver was subsequently appointed on behalf of the mortgagees, who also claimed the funds attached in the hands of the agent and received by him before the appointment of the receiver. The Supreme Court of the United States adjudged that the mortgagees had no right to the earnings of the road until they took possession through the receiver. (4)

This point was referred to by Strong, J., in *Wallbridge v. Farwell*. (5) The learned Judge said: "In assenting to the judgment of the court dismissing these appeals, I do not by any means intend to preclude myself in future, should the question be raised in proper form and in an appropriate case from consid-

(1) *New Clydock Sheet & Bar Iron Co. in re*, L. R., 6 Eq. 514.

(2) Sec. 95.

(3) *Jones, R. R. Securities*, § 114.

(4) *Gilman v. Ills. & Miss. Telegraph Co.*, 91 U. S. 603; see also *American Bridge Co. v. Heidelbach*, 94 U. S. 798; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459.

(5) 18 S. C. R. 1.

ering whether the principle, which is now universally recognized in the United States as to the applicability of current earnings to current expenses, incurred either whilst or before railway property comes under the control of the court, by being placed, at the instance of mortgagees, in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by our courts. This doctrine is now finally settled in the United States, where railway mortgages exactly resemble those in use with us, and which do not at all resemble the securities of debenture holders under the English system of securities for borrowed capital; and the practice referred to is so pregnant with justice, good faith and equity that there may be found strong reasons for applying it here when the question arises." (1)

While the company remains in possession of the road, the right to apply enough of the income to operate the road cannot be questioned. The amount to be so applied is within the discretion of the company. The same discretion extends to the surplus. It is for the company to decide what shall be done with it. (2)

After acquired property.

29. Section 95 of the Act includes, as subject to the preferential claim of the bondholders, property at any time acquired, which of course implies that property acquired by the railway after the issue of bonds is subject thereto. Generally, such mortgage can only attach to such property in the condition in which it comes into the mortgagor's hands.

Thus it has been held that a mechanic's lien for work done and materials furnished in building for a railroad company docks, wharves and piers, upon a branch road acquired after the making of the mortgage, takes precedence of the mortgage. (3)

Vendor's lien.

30. But this rule does not apply to an unpaid vendor's lien where the material supplied by the vendor becomes amalgamated with and a part of the whole railway, as in the case of rails, and therefore subject to the mortgage. And this is the rule both under the Quebec law and the English law. (4)

(1) At p. 4.

(2) *Gilman v. Ills. & Miss. Telegraph Co.*, 91 U. S. 603.

(3) *Williamson v. N. J. Southern Ry. Co.*, 28 N. J. Eq. 277-293, 29 lb. 311; *U. S. v. New Orleans R.R. Co.*, 12 Wall. 362-364.

(4) *Wallbridge v. Farwell*, 18 S. C. R. 7; and see *Galveston R.R. Co. v. Cowdrey*, 11 Wall. 459.

31. But in the case of rolling stock it becomes a question whether such stock forms a part of the realty or not. Under the law of Quebec it does, becoming immoveable by destination. Rolling stock
—part of
realty?

(1) And it has been held by the Supreme Court that the unpaid vendor of cars supplied and delivered to the company loses his privilege for their price, because they had become immoveable by destination, and the railway to which they were attached was mortgaged and had passed into the hands of third parties; and that even considered as moveables the rolling stock became affected and charged by virtue of the Statute and the mortgage, as security to the bondholders with right of priority over all other creditors, including the unpaid vendors. (2)

The Supreme Court of the United States, however, has decided that such cars, etc., are loose property, susceptible of separate ownership and separate liens; and that such liens, if binding on the railway company itself, are unaffected by a prior general mortgage given by the company, and paramount thereto. (3)

But in this country the decision of our Supreme Court would seem to have decided the question under our statutory law, at least in the Province of Quebec. The bonds in that case were issued, and the bondholders' rights declared, under a special Act of Parliament, which declared such bonds to be a first lien, privilege and mortgage upon the railway, its franchises and all its property, tolls and income, profits and improvements and renewals thereof. This statute was regarded by Mr. Justice Taschereau, who rendered the principal judgment, as setting at rest all possible controversy as to the relative rank of the unpaid vendor's claim and that of the trustees by enacting that the trustees should be first. (4) It was argued for appellant that the Statute merely says that the conveyance shall be "a first charge," and that this does not mean *the* first charge. But the learned judge thought there was no ground whatever for that distinction. The decision would *a fortiori* apply to any railway under the present Act where the language used is that "the bonds, etc., shall be taken and considered to be *the*

(1) C. C. 379.

(2) Ontario Car Co. v. Farwell, 18 S. C. R. 1.

(3) U. S. v. New Orleans R.R. Co., 12 Wall. 362.

(4) 18 S. C. R. at p. 15.

first preferential claim and charge upon the company and the franchise, etc., and real and personal property thereof at any time acquired." In the *Farwell* case, however, the trust indenture authorized the payment by the trustees "of all legal claims arising from the operation of the railway, including damages caused by accidents and all other charges;" and it was the opinion of Mr. Justice Gwynne that the appellants might be entitled to an equitable decree, framed with due regard to the other necessary appropriations of the income in accordance with the provision of such trust indenture. (1)

The most intelligent view would seem to regard rolling stock as being of the nature of immoveables.

In the Province of Quebec the question is free from doubt, rolling stock there being held to be immoveable by destination. (2)

In the United States the question is much debated. But in favor of the above contention it may be argued that the right to buy and own rolling stock is a franchise, and can only be exercised as an accessory to the operation of the railway. Any buying or selling of cars, engines, and the like, by the company, for the mere purpose of speculation, would be unauthorized and illegal. Hence the intention of the company to place them upon the railway for a permanency, the use to which they are destined, the connection between the railway and the cars, and the essential relation between them for the purposes of the undertaking, all combine to point out the true position of rolling stock as part of the realty. (3)

Mr. Jones, in his work on railway securities, says that while there are many and strong arguments for holding that rolling stock is part of the realty—and this view seems to have the support of the United States courts—the weight of authority in the State courts seems to be against that position. He, however, favors the view that rolling stock is part of the realty. (4)

(1) 18 S. C. R. at p. 34.

(2) C. C. 379. *Grand Trunk Railway v. Eastern Townships Bank*, 10 L. C. J. 17; *Wallbridge v. Farwell*, 18 S. C. R. 1.

(3) And see *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, note p. 648, on rolling stock as a fixture, being an extract from brief of Mr. Carpenter.

(4) Jones, *Railway Securities*, § 154.

On the other hand, Mr. Ewell, in his work on fixtures, takes the opposite view. (1)

Many authorities, without holding that engines and cars are fixtures, regard them as so indispensable to the operation of a railway, that they make a distinction between the rolling stock and the other kinds of personal property, in respect to the rule that property not *in esse* cannot be conveyed. The rolling stock of a railroad is regarded as so appurtenant to the road, that when the company makes a mortgage of its road and franchise, it has a present existing interest in the rolling stock to be acquired for its use sufficient to uphold a grant of it as incident to the road. (2)

The question might be considered from another point of view, viz., not as to whether rolling stock is theoretically part of the realty, but whether, for the purposes of the particular transaction, it should be so regarded or not. Thus, while it might be considered to be a part of the realty, as between the mortgagees and creditors claiming liens upon it as personal property, it is not necessary that it should be considered realty for the purpose of taxation, or that it should be considered realty in any other relation than that existing between the railway company and those claiming under it on the one hand, and the mortgagees on the other.

32. A railway company, in order to secure a loan, mortgaged Rails and other supplies. to a municipal corporation their lands, roads, depots, wharves, stations, tolls, revenues and all other property "now or during the existence of the said mortgage to be acquired." A quantity of iron rails was purchased for the railway, the vendors stipulating at the time of the sale that the rails should be laid down on that particular road.

The iron was shipped by the vendees, who endorsed the bills of lading, to the municipality, who paid the shipping charges, insurance, and freight duties, etc., out of monies which formed part of the advances secured by the mortgage. The iron was seized,

(1) Ewell, Fixtures, p. 39.

(2) Jones, § 150.

Under the Code Napoleon, all objects placed by a proprietor on his property for the service and working of the property are immovable by destination. C. N. 524, cp. C. C. 379.

under an execution against the railway, while in possession of the municipality, it being ready to be placed on the road. It was held that as the mortgage covered personal as well as real property, the words "other property" were not restrained to real property, and that under the endorsement of the bill of lading to the municipality, who obtained possession of the iron by such endorsement, together with the stipulation of the vendors and the assent thereto of the vendees, the municipality acquired the possession and the property in the iron, and it became a part of the property mortgaged. (1)

On the other hand, supplies intended for the maintenance and operation of the railway, but not incorporated with it, such as sleepers or ties, fastenings, fuel, etc., have been held in the Province of Quebec not to be immoveable by destination. (2)

Formalities in
making and
issuing bonds
—waiver.

33. Whatever may be the irregularities in the issue of bonds, etc., the corporation and its members are estopped from pleading the want of any formality prescribed by the Act by previous waiver of such formality. (3)

Thus where bonds issued in disregard of a prescribed formality were treated by the company as good, a stockholder who had attended meetings where the bonds were treated as good, upon subsequently filing a bill to restrain the company from redeeming the bonds, was held to be estopped from contesting their legality. (4)

Directory re-
quirements as
to formalities.

34. The general rule, that when statutory requirements are merely directory and not imperative, the omission to comply with them would not render void the particular act done under the authority of the Statute, would apply to any merely directory formalities required by the Act. So it would seem that where a Statute required all evidences of debt issued by a company to be signed by the president and treasurer, this would be looked upon as directory merely, and the signature of the secretary instead of the treasurer would be sufficient. (5)

(1) *Corp. of Lanark & Kenfrew v. Cameron*, 9 U. C. C. P. 109.

(2) *Wyatt v. Levis & Kennebec Ry. Co.*, 6 Q. L. R. 213 (S. C. R. 1880).

(3) See *Jones v. Municipality of the County of Albert*, 20 N. B. 78; 21 N. B. 200.

(4) *Zabriskee v. Cleveland, Columbus & Ohio Ry.*, 23 How. 381-398.

(5) *City Bank v. Cheney*, 15 U. C. Q. B. 400; and see *In re Farlinger & the Village of Morrisburg*, 16 O. R. 722; *Lewis v. Brady*, 17 O. R. 377; *Grand Trunk Ry. Co. v. Corporation of Levis*, 10 R. L. 612 (Q. B. Que. 1879).

Where a mining company was empowered to borrow money and mortgage its property upon a vote of the stockholders and directors, it was held that the company was liable upon a loan obtained by the directors without such vote, for the lender was justified in assuming that there had been a meeting and vote of the shareholders in the manner directed; (1) and likewise with the omissions of the preliminaries of corporate meetings, such as the publication of notices, or with regulations as to the manner of conducting such meetings, or the appointment and election of directors. (2) But this is not the case where the irregularity is one which appears on the face of the instrument itself;—the purchaser is bound to take notice of it. (3)

A distinction is also to be observed between transactions which are within the general scope of a corporation's powers without the aid of statutory authority, and those which depend altogether upon such authority for their validity. Requirements in the case of the former might be regarded as directory merely, which in the case of the latter might be regarded as conditions precedent to the exercise of the authority, or imperative requirements.

A defect in the mortgage does not invalidate the mortgage debt, but only the security for it; and a want of power to make the mortgage does not affect the obligations of the bonds secured. (4)

35. The fact that a certain municipal debenture had been stolen bonds, stolen previously to its being issued has been held to be no bar to the claim of a *bona fide* holder for valuable consideration without notice. (5)

(1) *Tyson's Reef Co. in re*, 3 W. W. & A. B. Cases at law 162; *Brit. Bank v. Turquand*, 6 El. & Bl. 327.

(2) *Township of Brock v. Toronto & Nipissing Ry.*, 17 Grant Chy. 425; *Fountaine v. Carmarthen Ry. Co.*, L. R., 5 Eq. 316; *Worcester Corn Exchange in re*, 3 D. G. M. & G. 180; *Anderson v. Duke, etc.*, *Gold Mine Co.*, 1 *Australian Jurist* 161.

(3) *Athenæum Life Assur. Soc. in re*, 4 K. & J. 549; *Geddes v. The Toronto Street Ry. Co.*, 14 U. C. C. P. 513; *The Commercial Bank of Canada v. The Great North Western Ry. Co.*, 3 Moore P. C. N.S. 313-314.

(4) *Philadelphia & Sunbury R. R. Co. v. Lewis*, 33 Pa. St. 33.

(5) *The Trust & Loan Co. of Upper Canada v. The City of Hamilton*, 7 U. C. C. P. 98; and see *Jones v. Municipality of Albert*, 21 N. B. 200.

Pleading
want of
formality.

36. A plea that such debenture was not issued "under the formalities required by law," because the by-law under which it was issued did not settle a special rate, and was therefore void, was held bad, for not averring distinctly that such debenture was issued in pursuance of a by-law, and for not pointing out wherein it was defective. (1)

Payee not
mentioned.

37. Debentures are not void because they are not made payable to any particular named individual or company ; as the legal effect of such an instrument must be construed to be an undertaking to pay the monies therein mentioned to the person to whom it was delivered, and who, by the effect of such delivery, became the payee in fact. (2)

Debentures
negotiable
instruments.

38. A debenture as commonly understood, and according to the general usage of this country, is a negotiable instrument in the nature of a promissory note transferable by endorsement or by mere delivery, (3) and therefore cannot bear a condition on the face of it, making its validity depend upon obligations to be performed in the future, and the party having a right to the delivery of debentures to him is entitled to have them free from such conditions. (4) The fact that debentures are under seal does not detract from their negotiable character ; and though a statute makes them a charge on all the property of the company, with a right of foreclosure and sale, this is something superinduced upon the security by virtue of the statute. (5)

The issuing of debentures in blank to be subsequently filled in upon delivery by the managing director, who is also secretary and treasurer, does not invalidate the debentures. The strict rules of the common law relating to deeds are not applicable to such debentures, but rather the rules of the law merchant relating to negotiable securities. (6) But even if this were not so, the fact that the name of the payee is not filled in until deli-

(1) *The Trust & Loan Co. of Upper Canada v. The City of Hamilton*, 7 U. C. C. P. 98

(2) *Geddes v. The Toronto Street Ry. Co.*, 14 U. C. C. P. 513.

(3) *Eastern Townships Bank v. Municipality of Compton*, 7 R. L. 446.

(4) *MacFarlane v. Corp. St. Césaire, M. L. R.*, 2 Q. B. 160, confirmed in Supreme Court, 14 S. C. R. 738.

(5) *Bank of Toronto v. Coburg, etc., Ry. Co.*, 7 O. R. 1.

(6) *Ibid.*

very does not make the debentures void. It would come within that class of cases where deeds have been held good, notwithstanding an alteration or subsequent addition, because, at the time of execution, there was something which could not be ascertained, and was therefore to be filled in afterwards. In this case, however, there was no execution, which imports delivery prior to the time when the name was filled in. (1)

39. Coupons are simply in effect promissory notes payable on the very day of their maturity without grace. (2) However their forms may vary, the interest and legal effect are the same. (3) Interest runs on them from the dates on which they respectively fall due, without the necessity of putting the debtor in default; (4) and this is the law in Quebec. (5)

40. It is not necessary that the coupons should be presented for payment at the place named, in order to establish a default on the part of the company, if it can be shown that the company was never ready to pay them, there or elsewhere. (6)

As soon as the day on which a coupon becomes due passes without payment, it is regarded as dishonored like other commercial paper remaining unpaid at maturity; and if thereafter transferred, the transferee takes it subject to all equities with which it was affected in the hands of the transferor. (7) The simple fact that an instalment of interest is overdue and unpaid is not sufficient to affect the position of one taking the bonds and subsequent coupons, before their maturity for value, as a *bona fide* purchaser. (8) But the presence of overdue and unpaid coupons on bonds may be a circumstance which, when coupled with other significant indications of invalidity, will prove sufficient to put a purchaser on inquiry. (9)

(1) *Bank of Toronto v. Coburg, etc., Ry. Co.*, 7 O. R. 1.

(2) *Daniel, Negot. Inst.* 1490.

(3) *Ibid.*, 1493.

(4) *Daniels Negot. Inst.*, §. 1505.

(5) *Desrosiers v. Montreal, Portland & Boston Ry. Co.*, 28 L. C. J. 1.

(6) *Re Thompson and the Victoria Ry. Co.*, 9 P. R. (Ont.) 119.

(7) *Daniels*, § 1505.

(8) *Ry. Co. v. Sprague*, 103 U. S. 762.

(9) *Parsons v. Jackson*, 99 U. S. 434. Explained in *Ry. Co. v. Sprague*, 103 U. S. 762.

Suit upon
coupons.

41. On motion of the owner of bonds with coupons attached, the Court will order such of the coupons as are not in litigation to be detached by the clerk of the Court and delivered over to the party moving. (1)

Transfer and
registration of
bonds.

42. A trustee held certain debentures of a railway company, on trust, to secure certain creditors of the company for advances made by them, which debentures were to be handed over to the creditors for sale, upon default in payment of the advances. The company made default, and the debentures were delivered over to the creditors. Held, that the creditors were entitled under a statute, (2) the relevant section of which was substantially the same as sec. 96 of The Railway Act, to be registered as holders of the debentures, to enable them to qualify and vote for directors. (3)

Where an Act provided that the secretary should register the bonds, it was held that a demand upon the assistant secretary was sufficient, where it could be shown that he performed all the duties of the secretary's office. (4)

Under the provisions of sections 96 and 97 requiring registration of bonds as a condition precedent to the holder's right to vote thereon, questions may arise as to what title should suffice to entitle the holder of such bonds to registration. Thus, in one case, under a similar act, the secretary refused to register unless the intermediate transfers were produced and registered at the same time. But it was held that he was bound to do so without the production or registration of the previous transfers. (5)

In another case a bank in Ontario received from bankers in London a number of bonds, represented by the London bankers as belonging to different persons named, and tendered them for registration at the railway office, in order that these persons might vote thereon. The secretary of the railway company registered such of the bonds as stood in the names of the original holders, but refused to register the others unless written transfers

(1) *Montreal, Portland & Boston Ry. Co. v. La Banque d'Hochelaga*, 27 L. C. J. 164 (Q. B. Que., 1883).

(2) 34 Vic., cap. 43 (Ont.), sec. 33.

(3) *In re Thompson & the Victoria Ry. Co.*, 8 Ont. Pract. 423.

(4) *In re Thompson & the Victoria Ry. Co.*, 9 Ont. Pract. 119.

(5) *In re Osler v. The Toronto, Grey & Bruce Ry. Co.*, 8 Ont. Pract. 506.

from the original holders were produced. It was held: that the company should register the bonds without such transfers; the proof of title in the alleged owners was sufficient; the issue of scrip in London as representing the bonds formed no objection. (1)

These cases arose under a statute which provided that the bonds "and any transfers thereof" should be registered before voting. These words are not in the present Act, under which the company are bound, on demand, to register such bonds, etc., and thereafter any transfers thereof. (2)

If the transferees desire to acquire the right of voting on the bonds, all the transfers should be evidenced in such a way as to enable the company to register them in the same way as transfers of shares. (3) The rights of the holder are always subject to the provisions of the mortgage deed, (4) one of the most usual being that no transfer, except upon the transfer book, shall be valid unless the last preceding shall have been to bearer, which shall restore transferability to the bond by delivery, but every such bond shall continue subject to successive registrations and transfers to bearer at the option of each holder.

43. In the case of an application for a mandamus, to compel Default. a railway company to register bonds, it was objected that it did not appear the company had made default in payment of the interest, the coupons not being shown to have been presented at the place named for payment; but it was held that the fact of the company never having been ready to pay them, there or elsewhere, was a sufficient answer to this objection. (5)

It is therefore not necessary as a condition precedent to recovery, to aver and prove presentment at a particular place, and a tender of the surrender of the bonds or a readiness to surrender them. (6)

(1) *In re* Johnson & The Toronto, Grey & Bruce Ry. Co., 8 Ont. Pract. 535.

(2) Sec. 96, and *supra* p. 42 *et seq.*

(3) *In re* Thompson & the Victoria Ry. Co., 9 P. R. (Ont.) 119.

(4) Sec. 96, ss. 3.

(5) *Re* Thompson & the Victoria Ry. Co., 9 P. R. (Ont.) 119.

(6) *Fellowes v. Ottawa Gas Co.*, 19 C. P. 174.

"At the next
general meet-
ing."

44. The words "at the next general meeting" used in a statute merely indicate the earliest period at which the bondholders may vote, and the statute does not require a new registration, in order to entitle the bondholder to vote at any subsequent meeting so long as the interest remains unpaid. (1)

Where the exercise of any power given under the general or special Act requires the assent thereto of a certain majority of the shareholders, present at a meeting specially called for that purpose, the word "shareholders" must be interpreted to include all who are entitled to vote as shareholders, which includes bondholders. (2)

"Raising
money."

45. The expression "raising money" used in section 93 subsec. 2 must be given a liberal construction, so the pledging of bonds with a contractor, as security for the price of the construction of the railroad, and in default of payment by the company, the contractor to take the bonds in payment at so much on the dollar, is to be construed as "raising money for the prosecution of the undertaking." (3)

"Best terms
and condi-
tions."

46. And the alternative given to the contractor of taking the bonds in default of payment of the contract at fifty cents in the dollar was considered, in the absence of evidence that more favorable terms could have been made, as being a pledging and allotting of the bonds upon the best terms and conditions obtainable within the meaning of the section. (4)

Distinction
between
pledge and
deposit as
collateral
security.

47. A distinction has been drawn in a Manitoba case between a pledging of bonds and a mere deposit of them as collateral security. Defendants purchased certain rails from the plaintiffs, giving in payment certain acceptances. It was agreed that "as collateral security for the payment of said acceptances at maturity, the defendants shall issue, and on production of the respective bills of lading shall deposit with the plaintiffs or their bankers

(1) *Hendrie v. Grand Trunk Ry.*, 2 O. R. 441. (Section 96 provides for voting at all subsequent meetings.)

(2) *Hendrie v. Grand Trunk Ry.*, 2 O. R. 441.

(3) *Winnipeg & Hudson Bay Ry. Co. v. Mann*, 7 Man. 81.

(4) *Winnipeg & Hudson Bay Ry. Co. v. Mann*, 7 Man. 81; and see *Regent's Canal Iron Works Co.*, L. R., 3 Ch. D. 43.

bonds of the defendants to an amount double that of the said acceptances." Power of sale in case of default was given. After default and recovery of judgment upon the acceptances, plaintiffs filed their bill on behalf of all holders of similar bonds for a receiver and for sale of the railway. It was held: that having regard to the surrounding circumstances, the plaintiffs were not pledgees; and that no obligation arose upon the bonds until after their sale by the plaintiffs under their power. (1) It may be well to quote the language used by the Court in delivering judgment: "It is not a question of the property in the pieces of paper on which the instruments are written, which would be originally in the railway company, and of which it might make a legal pledge. In the hands of the railway company there was no other property in respect of them. It could only be when issued to another party, as obligor or promisor in respect thereof, that the instruments could take effect as the obligations of the railway company, or that there could be said to be any property in the obligations to be pledged by a pledge of the papers containing them."

"There is then no possibility of treating the transaction as one of pledge of the obligations, for, unless the plaintiff company became the obligees or promisees so as to possess the legal title to the *choses in action* which the instrument purported to represent, there was no obligation or *choses in action* to be pledged.

"It is quite competent, however, for the railway company, by its officers, to sign and seal such instruments, and deposit them as security with a party making advances to it, upon the terms that such party should not be holder of them, that they should create no obligation to him, but that his only right should be to sell them, as the railway company might, and repay himself from the proceeds; he making them, thus, the obligations of the company to the purchasers."

"This, it appears to me, was the very transaction to which the parties sought to bind themselves by the agreement set out in the bill."

"At first sight the word 'issue' seems to imply the complete execution and delivery of the instruments to the plaintiff com-

(1) *West Cumberland Iron Co. v. Winnipeg & H. B. Ry. Co.*, 6 Man. 388.

Constructing?

pany, so as to make them the holders of the obligations thereby represented; but I think that the word may be considered to be used in a somewhat less proper sense to signify the preparation, signing and sealing of the documents, and the placing of them absolutely out of the possession and control of the railway company. The word is similarly used by Britt, C. J., in *Bavendale v. Bennet* (1) in speaking of a blank acceptance handed to a party to be filled up and negotiated. In fact, the 'issue' there was less complete as it was without consideration, and could be recalled at any time before use of the bill."

"The word used in the agreement to specify the transmission to the plaintiff company is 'deposit.' The instruments were to be 'deposited' with that company or its bankers. This is not an apt word to denote a completion of the execution by delivery. It appears rather to indicate the physical transfer of the pieces of paper unaccompanied by the mental intention involved in the word 'delivery' when technically used. I agree with the view of my brother Bain, that the word would be properly applied to a transaction of pledge, rather than to one of mortgage, which is what the plaintiff's bill really assumes this to have been. In fact, it represents a bailment rather than a transfer of property or creation of an obligation, though often of another kind than the naked bailment known as depositum." (2)

Extent of
borrowing
power—con-
dition prece-
dent.

48. A very important point as to the extent of a company's borrowing power, and the effect to be given to statutory conditions limiting such power, arose in the case of the *Corporation of Quebec v. Quebec Central Railway Co.* (3) A railway company was authorized by a special Act to issue bonds or debentures to the extent of £300,000, in three successive issues, each of the second and third issues to depend upon the performance by the company of certain conditions precedent. The first £100,000 were issued at once as authorized.

The second £100,000 were issued when only 43½ miles of the railway had been completed, it being one of the conditions precedent that 45 miles should be completed and in running order, as certified by the Government inspecting engineer.

(1) L. R., 3 Q. B. D. 525.

(2) 11 West. Cumberland v. Winnipeg & H. B. R. R. Co., 6 Man. 394, per Killam J.

(3) 10 S. C. R. 563.

Before the issue of the third £100,000, an Act was passed modifying the previous conditions as to that issue, and the preamble declared that a total length of 45 miles had been completed, and a first and second issue each of £100,000 of the company's debentures made.

This recital was erroneous. The question that arose was whether the recital in the preamble of the last act rendered the second issue of bonds mentioned therein good and valid and binding on the company, although the conditions precedent required by the first Act had not been fulfilled. The majority of the Court held that it did, Ritchie, C. J., and Strong, J., dissenting. (1)

49. Where a company has exceeded the borrowing powers given by their original Act of incorporation, yet sufficient borrowing powers had been given by subsequent Acts, and their exercise sanctioned by the shareholders, the borrowing was not *ultra vires* the authority of the managers and directors. (2)

50. Where power is given to a company by its special Act to borrow money, and to issue bonds or debentures for necessary repayment of any sums so borrowed on certain terms, the securities upon which the company has power to borrow are not restricted to bonds or debentures only. Borrowing money by advances from a bank, which advances were to be covered by monthly bills on the company borrowing, and their available traffic receipts would be within such a provision. (3)

Where an Act makes it lawful to promote the traffic of other railways, the company can apply funds borrowed under their powers for the maintaining of such railways. (4)

Trustees.

51. Notwithstanding the provision of sub. sec. 2 of section 95, that no action shall be taken to enforce payment of the bonds,

(1) It should be noted that Fournier and Henry, J. J., held in this case that the illegality of the second issue had not been legally proved, as the certificate of the engineer that only 43½ miles had been completed was not produced.

(2) The Commercial Bank of Canada v. The Great Western Ry. Co., 3 Moore N. S. 295.

(3) Ibid.

(4) Ibid.

debentures, etc., or of the interest thereon, except through the trustee or trustees appointed under the mortgage deed, it would seem that if the trustees should fail or refuse to act, any of the bondholders, for themselves and in behalf of the rest, might step forward and put in motion the machinery of the law, making the trustees parties defendant, (1) otherwise the bondholders would be without remedy, except perhaps by mandamus to compel the trustees to act. However, this right is generally given by the deed, and if so could be validly exercised under section 96 (ss. 3).

Rights of
bondholders
to protect
their interests.

52. The trustees, acting for the bondholders, have sufficient authority and interest to enable them to maintain a bill in equity to enjoin an alleged illegal proceeding which will seriously depreciate the value of the bonds secured. (2) In Quebec it has been held that the holder of railway bonds, constituting a privileged claim on the moveable property of the company, may, for the protection of his rights, proceed against such property by an attachment in revendication in the nature of a *saisie conservatoire*. (3) And the bondholders themselves can maintain an action to restrain a fraudulent diversion of a portion of property mortgaged for their security, when one of the trustees is in collusion with the company. (4)

Notice.

53. Notice to trustees under an ordinary mortgage deed is notice to the holders of the bonds secured by the mortgage. Therefore, actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the incumbrance. (5) And the fact that the bonds are treated as negotiable, and pass from hand to hand like bank bills, does not affect the question of the agency of the trustees in reference to the security provided by the mortgage. (6)

Trustees as
common
carriers.

54. Trustees in possession of the railway under the provi-

- (1) Jones R. R. Securities, § 362.
- (2) Murdock v. Woodson, 2 Dill. 188.
- (3) Wyatt v. Senecal, 4 Q. L. R. 76.
- (4) Weetjen v. St. Paul & Pacific R. R. Co., 4 Hun. 529.
- (5) Miller v. Rutland & Washington R. R. Co., 36 Vt. 452.
- (6) Per Barrett, J., in same case, p. 484.

sions of the deed have been held liable as common carriers to the same extent that the corporation would be liable. (1)

55. A party having agreed to advance money to a railway company for the completion of its road, an agreement was executed, by which, after a recital that he so agreed, and that a bank had undertaken to discount his notes endorsed by the firm of which he was a member to procure the money to be advanced, the railway company appointed said bank its attorney irrevocable (in case the company should fail to pay the advances as agreed) to receive the bonds of the company (on which the lender held security) from a trust company with which they were deposited, and sell them to the best advantage, applying the proceeds as set out in the agreement. Who are trustees.

The railway company having failed to repay, as agreed, to the party making the loan, the bank obtained the bonds from the trust company, and threatened to sell the same.

The company by its manager wrote to the lender's firm a letter, requesting that the sale be not carried out, but that the bank should substitute them as the attorneys irrevocable of the company for such sale, promising that if that were done, the firm should have the sole and absolute right to sell the bonds, the proceeds to be applied in a specified manner. The firm agreed to this, and extended the time for payment of their claim, and made further advances; and, as authorized by the last mentioned agreement, they re-hypothecated the bonds to the bank on certain terms. The company having again made default, the bank gave notice that the bonds would be sold.

In an action by the railway company to restrain such sale, it was held that the bank and the firm were respectively first and second encumbrancers of the bonds, being to all intents and purposes mortgagees, and not trustees, of the company in respect thereof, and that there was no rule of equity forbidding the bank to sell or the firm to purchase under that sale. (2)

It was further held that if the firm should purchase at such sale, they would become absolute holders of the bonds, which would

(1) *Daniels v. Hart*, 118 Mass. 543.

(2) *Nova Scotia Central Ry. Co. v. Halifax Banking Co.*, 21 S. C. R. 537.

not be liable to be redeemed by the company. (1) It was not decided in this case what would be the effect of a trust deed by which the railway was vested in trustees for the security of bondholders. But according to the authority of *Wallbridge v. Farwell*, (2) this fact would make no difference in the rights of the parties. When followed by possession in the terms of the trust deed the property in the railway vests in the trustees, and the interest of the railway company is reduced to a bare right of redemption. (3)

Distinction
between mort-
gage and
hypothec
under the
civil and com-
mon law.

56. It may not be out of place at this point to set forth the distinguishing features of mortgage under the civil and common law systems.

The hypothec of the civil law had its origin in Greece, from whence it was adopted by the Romans. It consisted in an agreement whereby the debtor pledged his property without abandoning the possession, on the condition, however, that in case the debt was not paid at maturity he should lose his title to the property. (4)

Under the Quebec civil code (5) hypothec is a real right upon immovables made liable for the fulfillment of an obligation, in virtue of which the creditor may cause them to be sold in the hands of whomsoever they may be, and have a preference upon the proceeds of the sale in order of date as fixed by that Code. (6)

The use in that Province of trust deeds in the English form, and the recital in special Acts of the phraseology of the English law, has given rise to anomalies such as adjudicated upon in the case of *Wallbridge v. Farwell*. (7)

In that case the statute authorized the conveyance of the road to trustees for the purpose of the trust. The deed of trust used the word "sold." The judge of the Superior Court construed these terms as constituting a pledge of the railway

(1) *Nova Scotia Central Ry. Co. v. Halifax Banking Co.*, 21 S. C. R. 537.

(2) 18 S. C. R. 12, *Taschereau*, J.

(3) *Redfield v. Corpn. Wickham*, 13 App. Cas. 473.

(4) *Troplong*, *Hypothèque*, vol. 1, No. 7.

(5) C. C. 2016, and see arts 2040-44.

(6) 2009, 2047, 2130 C. C.

(7) 18 S. C. R. 1.

to the trustees with this modification, that the trustees could permit the company to work the property so long as the interest on the bonds was paid. Counsel for the appellant before the Supreme Court argued that there was either a pledge, or an actual and complete sale of the railway. But Taschereau, J., who rendered the principal judgment of the Supreme Court, could not see in the deed a contract of pledge. Possession by the pledgee is such an essential feature of that contract (1) that there could not, in his opinion, exist any such thing as a contract of pledge: (2) "It seems to me impossible to see in that deed, as interpreted in the light of the Statute of 1885, anything else than a hypothecation of this railway in favor of the bondholders, not precisely the hypothecation of Article 2016 C. C., but with the exceptional right, given by the statute, of the mortgagee to enter into possession, in default of payment, after the exercise of which right the contract between the parties became one of *nantissement* (pledge), with, of course, *droit de rétention* (lien), till paid, joined to the hypothec. (3)

Under the system of common law as distinguished from civil law, a mortgage is *in law* an absolute conveyance subject to an agreement for a reconveyance on a certain given event. But the Court of Chancery allows the debtor, on payment within a reasonable time after the debt becomes due, to redeem his estate, and this is called his equity of redemption. Equity will not suffer any agreement in a mortgage to prevail which will change the latter into an absolute conveyance upon any condition or event whatever. (4)

It follows that, as at common law the estate is in the mortgagee, an execution creditor cannot seize the mortgagor's estate in the property. His remedy must be in equity, which allows him either to redeem the prior incumbrances, or entitles him to equitable execution, and consequently to a decree for the appointment of a receiver and sale of the property; but the receiver will be appointed without prejudice to the rights of prior

(1) C. C. 1966-67.

(2) Citing 10 Q. L. R. 308; 4 Q. L. R. 323; 6 Q. L. R. 1.

(3) Taschereau, J., in *Wallbridge v. Farwell* at p. 12.

(4) *Williams Real Prop.*, Am. Ed. 1886, p. 421-426

incumbrances, and he must not interfere with any prior incumbrancer who might be in possession. (1) It was doubtless such considerations as these, based upon the common law doctrine as to mortgages, which led to the decision in the Phelps case (2) without sufficient attention being paid to the Railway Acts.

(1) *Wells v. Kilpin*, L. R., 18 Eq. 298.

(2) *Supra*, p. 101.

CHAPTER VI.

RECEIVERS.

RECEIVERS.

1. *Appointment.*
2. *Quebec.*
3. *United States and England.*
4. *Louisiana.*
5. *France.*
6. *Ontario.*

7. *In what cases appointment will be made.*
8. *Duties and powers.*
9. *Division of income.*
10. *Extraordinary outlay.*
11. *Payment of right of way.*

1. A receiver is a person appointed by a court of equity to **Appointment.** take charge of property in dispute. The order appointing him is in the nature of an injunction, or writ of sequestration, preventing any disposition of or interference with the property without the consent of the Court. (1) There seems to have been a considerable difference of opinion as to whether courts of equity had any general equity jurisdiction over corporations, as such, or whether their jurisdiction attached only by virtue of such recognized heads of jurisdiction as trusts, injunctions and the like. (2) But it is certain that, apart from statutory enactment, courts of equity will appoint a receiver over corporate property in the following cases: 1. At the suit of mortgagees or of bondholders who have a lien on the corporation property. (3) It is considered that where an Act authorizes the mortgage of a railway, it also by implication authorizes the appointment of a receiver as necessary to give effect to the mortgage. (4) 2. At the suit of creditors who have obtained judgment which they are unable to collect by levy under common law execution. (5) 3. At the suit of any creditor or stockholder interested in the funds of a mortgaged corporation, where there is a breach of duty on the part of the directors and a loss or threatened loss of

(1) *Thornton v. Washington Savings Bank*, 76 Va. 433.
 (2) *Kerr on Receivers* Annotation by Bispham, 2nd Am. ed., p. 80; *High on Receivers* (1886), § 288.
 (3) *Furness v. The Caterham Ry. Co.*, 25 Beav. 614; *Kerr on Receivers*, 2 Am. ed., p. 81.
 (4) *Peto v. Welland Ry. Co.*, 9 Grant Chy. 457, *Esten v. C.*
 (5) *Evans v. Coventry*, 5 D. G. M. & G. 911.

funds ; (1) or a state of things exist in which the governing body are so divided they cannot act together (2) ; or where a corporation has practically closed its business. (3) 4. Where a corporation is dissolved and has no officer to attend to its affairs. (4)

Quebec.

2. In the Province of Quebec such officers as receivers are not recognized ; but by article 1823 of the Civil Code, a sequestrator can be appointed by order of the court over moveables or immoveables concerning the property or possession of which two or more persons are in litigation.

In an early case it was decided in that Province (5) that the court had not power to appoint a sequestrator or receiver to the railway ; that the law regarding sequestration of property does not extend to the judicial sequestration of the property of bodies corporate. This case was carefully considered, but since the advent of the Code, which merely crystallizes the old law on the subject, numerous French commentators have discussed the matter, and a fairly abundant jurisprudence has interpreted it, with the result that, although at the present day, in the Province of Quebec the question may be considered a very delicate one, yet in the recent case of *Lambe v. The Montreal & Sorel Railway Co.*, (6) it has been held that a sequestrator can be appointed to the property of a railway company. And this conclusion would seem to be sound. For while under the Quebec law a receiver could not be appointed to take over and manage the company as a corporation, the Code clearly contemplates the sequestration of property in litigation in the interest of all concerned, and the administration of the property by the sequestrator subject to his accounting to the court. (7)

(1) *Potts v. Warwick, etc., Canal Nav. Co.*, Kay 142 ; *Whitworth v. Gaugain*, 3 H. 416 ; *Ames v. Trustees of Birkenhead Docks*, 20 B. 332 ; *Peto v. Welland Ry. Co.*, 9 Grant Chy. 455.

(2) *Featherson v. Cooke*, L. R., 16 Eq. 298 ; *Trade Auxiliary Co. v. Vickers*, ib. 303.

(3) *Warren v. Fake*, 49 H. Prac. Rep. 430.

(4) *Hamilton v. Transit Co.*, 26 Barb. 46 ; *Murray v. Vanderbilt*, 39 Barb. 140 ; *Lawrence v. Greenwich Fire Ins. Co.*, 1 Paige 587.

(5) *Morrison v. Grand Trunk Ry. Co.*, 5 L. C. J. 313, S. C. 1861, Monk J.

(6) Decided in 1891, but not reported. The Court of Review decided, reversing the judgment of *Taschereau, J.*, of the Superior Court, that a sequestrator could be appointed to a railway.

(7) C. C. 1823-1829 ; and as to dissolved corporations see C. C. 371-3.

3. In the United States the jurisdiction in such matters is, as in United States England, an equitable one; yet the majority of decisions there and England. have held that the general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation, or of winding up its affairs and sequestrating the corporate property and effects, in the absence of express statutory authority. (1) In England the court can appoint a receiver at the suit of a mortgagee of tolls, independently of any Act of Parliament, on the ground that when an Act of Parliament authorizes a mortgage, it authorizes, as incident to it, all necessary remedies to compel payment, and in the case of tolls a power to appoint a receiver. (2) But the receivership does not extend to the management of the railway. (3)

There is that peculiarity in the undertaking of a railway which would make it improper for a Court of Chancery to assume the management of it at all. Where the legislature, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the company will themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred. It is impossible to suppose that a Court of Chancery can make itself or its officers, without any parliamentary authority, the hand to execute these powers. It is immaterial that the company do not object to, or may even desire, the appointment of a manager by the court. (4)

In the United States it has in some cases been held, that even in the absence of a statutory enactment, it is competent for a Court of Chancery to appoint a receiver to take charge of and manage a railroad, where such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure

(1) High on Receivers, § 288.

(2) *De Winton v. Mayor of Brecon*, 26 Beav. 541; Kerr, Receivers, 2nd Am. ed., p. 68.

(3) *Gardner v. London, Chatham & Dover Ry. Co.*, L. R., 2 Ch. App. 212.

(4) Per Lord Cairns in *Gardner v. Lon., Chatham & Dover Ry. Co.*, L. R., 2 Ch. App. at pp. 212-213.

of justice. (1) As was said by Mr. Justice Swayne of the United States Supreme Court: (2) "It has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the States they (receivers) are by statute charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. As regards the Statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid."

Louisiana.

4. In Louisiana, where the law of sequestration is similar to that of the Province of Quebec, it has been held that, under the laws and jurisprudence of the State, the courts have no power to appoint receivers to railroad companies, and that, as a general principle, courts have no jurisdiction to appoint receivers for corporations in the absence of express statutory authority. (3) But it has been held in that State that the courts have the power of appointing receivers to liquidate the affairs of insolvent corporations, if there be no other person provided by law to effect such liquidation, whenever it is necessary in order to preserve the interests of all parties concerned. (4)

This was in the case of an insolvent bank, and, as the corporation had ceased to exist, the court said that it was bound, *ex propria motu*, to prevent the confusion and dilapidation consequent upon the abandonment of its affairs produced by the inefficiency of the law. The same was held in a later case. (5) The courts of Louisiana have carefully refrained from appoint-

(1) *Stevens v. Davidson*, 18 Grattan 828; *Paige v. Smith*, 99 Mass. 395; *Blumenthal v. Brainard*, 38 Vt. 408; *Del., Lack. & West. Ry. Co. v. The Erie Ry. Co.*, 6 C. E. Green 298.

(2) *Davis v. Gray*, 16 Wall. 219.

(3) *Baker v. Louisiana Portable Ry. Co.*, 34 La. Ann. 755.

(4) *Starke v. Burke*, 5 La. Ann. 740.

(5) *In the matter of the Mechanics Society*, 31 La. Ann. 627.

ing receivers, and the above instances are the only ones where such an appointment would be made. (1)

On the other hand, it has been laid down as a general principle in a Quebec case, (2) that the judge has power to order every kind of conservatory measure which the interests of the parties require; that this power is indefinite, and confided to the wisdom and discretion of the judge who exercises it; and that article 1823 of the Civil Code is not restrictive, but simply indicative of an instance in which a sequestrator can be ordered. This is the view of M. Gillouard, the latest French author on the law of *Sequestre*, (3) who thinks that sequestration can be ordered even where there is no dispute as to the property in, or possession of, the thing sought to be sequestrated.

5. The French authors do not discuss the question of sequestration of bodies corporate. In France, all railways, whether constructed or conceded by the State, or by the departments or communes, are considered as forming part of the national highways, and, consequently, of the public domain.

They are therefore not susceptible of alienation or of expropriation. (4)

The French authors and jurisprudence therefore are in no way applicable, as their system of railway legislation is so different from ours.

6. The case of *Peto v. Welland Canal Company* (5) brought up for the first time in Ontario the question as to whether a judgment creditor of a railway company, with execution against lands of the company lodged in the hands of the sheriff, is entitled to the appointment of a receiver of the earnings of the road, the profits thereof to be applied in payment of his demand. Cases had already been decided in which courts had appointed receivers of railways at the instance of mortgagees, it being considered that when the Act authorized the mortgage of a railway, it also, by implication, authorized the appointment of a receiver

(1) *Baker v. Louisiana Portable Ry. Co.*, 34 La. Ann. 756.

(2) *Drummond v. Holland*, 23 L. C. J. 241.

(3) Gillouard, *Prêt Dépot, et Séquestre* (1892), No. 175.

(4) Vigoureux, *chemin de fer* (1886), No. 15.

(5) 9 Grant Chy. 455.

as necessary to give effect to the mortgage. These cases show that the appointment of a receiver to a railway is not contrary to public policy, and in fact it must be obvious that as a receiver is only to receive the surplus, after defraying all the expenses of the road, which is all the time managed by the directors of the company, the appointment of such an officer cannot be contrary to public policy. (1) In this case also the distinction was made between a receiver as such and a receiver with the powers of a manager of a road. A receiver, when spoken of under the Ontario or English law, is undoubtedly one with very limited powers, and not the receiver as meant in the United States, where that officer is usually a manager of the railway.

In an early Ontario case (2) a "manager or receiver" of the undertaking was appointed, so states the head note; but according to the report, the petition asked for a "receiver" of the undertaking, and a receiver in Ontario is not a manager. (3) His duties are stated to be, in *Simpson v. The Ottawa & Prescott Railway Company*, (4) to receive the gross receipts of the company for the carriage of passengers, freight, mails, etc., and to pay the bills for running expenses thereout. And this is the sense in which the duties of a receiver in England are interpreted. It was not until the Statute 30 and 31 Vic. (c. 127, s. 4) that managers could be appointed by the Court of Chancery over a railway company. The words used in sec. 4, c. 127, of that Act are: "may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking."

It was further said in the above case that the management of the railway must remain in the hands in which the Legislature has placed it. It is no part of the duty of a receiver to interfere with it. (5)

(1) *Esten v. C.*, in same case.

(2) *Galt v. The Erie, etc., Ry. Co.*, 14 Grant Chy. 499.

(3) *Allan v. Manitoba & N. W. Ry. Co.*, 14 Can. L. T. 315.

(4) 1 Ch. Chamb. 126; 10 U. C. L. J. (O. S.) 108.

(5) A holder of overdue debentures issued by a tramway company incorporated by special Act of Parliament, brought an action to realise his security, and moved for the appointment of a receiver and manager. The company was stated to be insolvent, but had not been ordered to be wound up — Held, that a tramway company was not within the principle of *Gardner v. London, Chat. & Dover Ry. Co.* (L. R. 2 Ch. 201), and that the court would appoint a manager. *Bartlett v. West Metropolitan Tramway Co.* (1893) 3 Ch.

The learned judge also stated the duties of a receiver to be, "to watch the expenses of the company ; to remonstrate with its officers and servants when, in his judgment, they are needless or excessive ; and, when due attention is not paid to his representations, to present the matter to this Court ; and this more especially if any case should come under his observation of expenses incurred otherwise than in good faith. He will of course have a right to the fullest information, as well from inspection of the books as otherwise. I think all this necessarily flows from the nature of his duties. He is called on to pay out monies as for expenses properly and necessarily incurred, and he should to a reasonable extent see that they are such." (1)

Boyd, C., in *Lee v. Victoria Ry. Co.* (2) said, speaking of the appointment of a receiver: "The management of the road is not interfered with, but is left to the board of directors subject to this, that the court, through its officer the receiver, retains control of the expenditure. The position is anomalous, to some extent, owing to the absence of any power to appoint a manager, which, though conferred upon the court in England, is not so here."

Upon the whole, there would seem to be no reason, even in the Province of Quebec, why the courts should not appoint a sequestrator or receiver of the property, tolls, and revenues of a railroad, with the view to having the same administered for the benefit of the creditors of the company, subject to the rights of mortgagees and other prior incumbrancers, and to the right of the directors of the company to work and manage the undertaking for the necessary purposes of the statute.

But the appointment of a sequestrator, or receiver, with power to manage and carry on the company, would appear, from the jurisprudence with regard to receivership in England, the United States, and this country, to be incompetent of the courts here in the absence of statutory authority.

7. In the appointment of a receiver the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well established principles ; and in that sense only

In what cases appointment will be made.

347 ; 69 L. T. 560. See also *Ames v. The Trustees of the Birkenhead Docks*, 20 Beav. 350, where the respective duties of the governing body of the company on the one hand, and of the receiver on the other, are defined. And see *Lee v. Victoria Ry. Co.*, 29 Grant Chy. 111, Boyd Ch.

(1) 1 Ch. Chamb., at p. 30.

(2) 29 Grant Chy. 111.

can a receiver be said to be *ex debito justitiæ*, whether the application be interlocutory or made at the hearing, whether the appointment of a receiver is the sole object of the action or only incidental to other relief, and whether the relief is sought at the instance of a judgment creditor or of anyone else. (1)

And the court will not appoint a receiver, by way of equitable execution, on the ground that it will do no harm, unless there is reason to believe that there is something to be received in which the plaintiff can be interested. (2) Trustees of first mortgage bonds covering the first division of a railway are entitled to have a receiver appointed for that division, upon default of the company to pay interest on such bonds, and this independently of the prior appointment of another receiver of the whole road by judgment creditors of the company. Such judgment creditors could not have the trustees of the first mortgage bonds made parties to their suit, the latter having a lien and charge which were prior to the former's claim; they could only have parties added whose claims were subsequent to theirs. (3)

Duties and
powers.

8. Where a receiver of a railway company was appointed to receive "the rents, issues, and profits of the railway," it was held that it was his duty to receive the gross receipts of the company for the carriage of passengers, freight, mails, etc., and to pay the bills for running expenses thereout, and not to receive only the surplus after the payment of expenses.

In the case of a judgment creditor who has secured the appointment of a receiver, it is usual for the latter, out of the gross revenue received by him, to pay the expenses of the undertaking and the interest of the mortgagees, if any, and the balance into court. (4)

Section 94 of the Act provides that the rents and revenues of the company shall be subject in the first instance (after payment of certain penalties) to the payment of the "working expenditure" of the railway. The difficulty is to determine how far debts in-

(1) *Smith v. Port Dover & Lake Huron Ry. Co.*, 12 Ont. App. 288.

(2) *Smith v. Port Dover & Lake Huron Ry. Co.*, 12 Ont. App. 288.

(3) *Allan v. Man. & N. W. Ry. Co.*, Man. Q.B. 1894, 14 Can. L. Times 315-317.

(4) *Ames v. Trustees of the Birkenhead Docks*, 20 Beav. 350.

curred for working expenses before the appointment of a receiver would be preferred to the claims of the bondholders.

In Ontario, where a receiver of a railway had been appointed to take the revenues, issues and profits, to pass his account periodically, and to pay into court the balance due from him after providing for the working expenses and outgoings of the railway; the master was directed to take an account of all persons entitled to liens, charges or incumbrances, and to settle their priorities, and the money to be paid into court was to be paid to such persons according to their priorities to be ascertained. The court held that the master, in taking the receiver's accounts, should have allowed debts paid for working expenses which were incurred before but not regularly payable until after his appointment, but not those already in default at that time, which latter were properly payable out of the money to be paid into court according to their priority. (1)

The phrase "ordinary mode of doing business" is interpreted as meaning the mode which is most advantageous or convenient, and does not include other modes or expedients to which a company may be driven by its necessities, and the natural result of which is the creation of debts. (2) The term "working expenses," regarded in the ordinary signification of the words, and also in relation to the purpose of keeping the railway going, notwithstanding the appointment of a receiver, has been held to include only those expenses which are necessary to keep it working, and not expenses of by-gone times, by which the present working of the road was no more affected than it was by any overdue debt or coupon. (3)

In the case of *Wallbridge v. Farwell*, (4) however, in the Supreme Court, Mr. Justice Strong used the following significant language: "I do not by any means intend to preclude myself in future, should the question be raised in proper form and in an appropriate case, from considering whether the principle which is now universally recognized in the United States, as to the applicability of current earnings to current expenses, incurred either whilst or before railway property comes under the control of the court,

(1) *Gooderham v. Tor. & Nipissing Ry. Co.*, 8 Ont. App. 683, per Patterson, J., at p. 694.

(2) *Ibid.*

(3) *Ibid.*, p. 694.

(4) 18 Can. S. C. R. 1.

by being placed, at the instance of mortgagees, in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by our courts. This doctrine is now firmly settled in the United States, where railway mortgages exactly resemble those in use with us, and which do not at all resemble the securities of debenture holders under the English system of securities for borrowed capital; and the practice referred to is so pregnant with justice, good faith and equity that there may be found strong reasons for applying it here when the question arises." There is no doubt that, as stated by the learned judge, the principle he advocates is now universally recognized in the United States; but in that country the rule has been extended to mere contract debts of the railway company, such as for labor, materials and supplies, incurred prior to the appointment of the receiver, and unsecured by any lien upon the property.

In such cases Mr. High, in his work on receivers, (1) thinks the doctrine is wholly indefensible upon sound legal reasoning. The allowance of such preference plainly impairs the obligation of the mortgage contract, and in practice frequently absorbs much of the mortgage security. That author thinks, however, that the doctrine is so strongly intrenched in authority in the United States that it can no longer be questioned.

Division of
income.

9. It has been forcibly argued that, the duty of the railway company being to apply its current income to the payment of obligations incurred in the daily operation and management of the road, before applying such income for the benefit of the mortgage bondholders, a diversion of such income, as by payment of bonded indebtedness, or by permanent improvement of the property for the benefit of the bondholders, would justify the courts in restoring to such unsecured creditors from the receiver's income what has been improperly diverted by the company for the benefit of the bondholders; and that the mortgagee, in accepting his security, is regarded as having impliedly agreed that the current debts of the company, incurred in the

(1) High, § 394 a.

ordinary course of its business, shall be paid out of its receipts before he has any claim upon the income. (1)

On the other hand, it seems to the author that the mortgagee is entitled to presume that the income of the company has been properly applied; and it would seem hardly just when he comes to realize his security that he should find it largely impaired by overdue and outstanding debts, taking precedence of his claim on the ground that they were incurred for the "working expenditure" of the railway; and these words in the Act would seem to include only the expenditure necessary to work and carry on the railway, and not past due debts; the author would, therefore, prefer the doctrine laid down in *Gooderham v. Toronto & Nipissing Ry. Co.*, (2) notwithstanding the very broad language used by the (now Chief Justice of the Supreme Court in the dictum above cited.

10. While it is the duty of the receiver of the gross revenue of a railway, to pay thereout all expenses necessary for the maintenance, management and working of the undertaking, he would not be warranted in spending the same in any extraordinary outlay; and where an application was made by the receiver to authorize the purchase of a large amount of rolling stock, the outlay in respect of which would require to be met by anticipating income, the court refused to sanction the expenditure. (3) Nor have the Court jurisdiction or discretion to order a receiver, who represents other interests than those of the first mortgagees of a railway, to borrow money on the security of the railway and payable in priority of all other charges thereon; such sum to be used in paying debts claimed to have been incurred for "working expenditure" under the Act. This could only be done on the application of the first mortgagees. (4)

11. The payment by a receiver of a sum of money to the owner of land over which the line ran, for the right of way over his lands, he having threatened to obstruct the passage of the company's trains unless paid, is not a payment which could be included in the term "working expenses or outgoings." (5)

(1) *Fosdick v. Schall*, 99 U. S. 235. *Williamsons' Adms v. W. C. V. M. & G. S. R. Co.*, 33 Grattan 624. *High on Receivers*, § 394 c.

(2) *Ubi supra*, p. 132.

(3) *Lee v. Victoria Ry. Co.*, 29 Grant's Chy. 110.

(4) *Allan v. Man. & N.W. Ry. Co. (Man. Q.B.)*, 14 C. L. T. 416.

(5) *Gooderham v. Tor. & Nipissing Ry. Co.*, 28 Grant Chy. 212.

CHAPTER VII.

EMINENT DOMAIN.

1. *Crown lands.*
2. *Alienation of such lands.*
3. *Lands reserved for naval or military purposes.*
4. *Indian reserve land.*
5. *Lands of another railway.*
6. *Contracts for purchase of land before deposit of map and plan.*
7. *Annual rent.*
8. *Who may convey lands.*
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35. *Loss of business.*
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46. *Appeals from award. Practice.*
47. *Bringing the arbitration record into court.*
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51. *Costs of arbitration.*
52. *Interest.*

The powers of eminent domain granted to railway companies under The Railway Act have already been generally stated; (1) it now remains to be considered in what manner and to what

(1) *Supra*, p. 73 *et seq.*

extent, and under what limitations and conditions, these powers may be exercised.

Supposing that the company has made and deposited the necessary plans, and given the notices required of such deposit, (1) how is the company to proceed to obtain the land required to construct and maintain the railway?

1. First as to Crown lands; the company cannot take any of Crown lands. the lands of the Dominion, without the consent of the Governor in council, (2) nor any of the lands belonging to any Province without the consent of the Lieutenant Governor; (3) but with such consent, and upon such terms as may be prescribed by those executive officers, the company may take and appropriate, for the use of its railway and works incidental thereto, but not alienate, any of the lands of the Crown lying on their route which have not been granted or sold to others, and which are necessary for the purposes of the railway. (4) They may also take any such part of the public beach or land covered by any lake, stream, river or canal, always with such consent, as may be necessary for the construction of the railway. (5)

Whenever such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the governor in council for the like purpose or trust. (6)

2. But the company could not, prior to the passing of the Alienation of amending Acts 53 Vic., cap. 28, and 55-56 Vic., cap. 27, alienate such lands. any part of the Crown lands obtained for the construction or in aid of the railway. And even under par. s., added to section 90 by those Acts, it would seem doubtful whether the company could alienate any part of Crown lands taken under section 99. The power to alienate under par. s., according to the strict language of the statute, only refers to lands "obtained" from the Crown by way of subsidy or otherwise; and, as the prohibition to alienate contained in section 99 remains, the legislature would appear to have intended to make a distinction in this respect

(1) Secs. 123 to 135; and sec. 144; and *supra*, p. 76.

(2) Sec. 99.

(3) See appendix, sec. 99.

(4) Sec. 99.

(5) *Ibid.*

(6) *Ibid.*

between lands "obtained" and lands "taken and appropriated" under sec. 99. This is the only interpretation which would give effect to the contradictory enactments of the two sections; and it is not satisfactory, inasmuch as section 99 speaks of compensation money to be paid for lands taken thereunder; and certainly the taking of lands, with the consent of the Crown, and on payment of compensation therefor, would seem to amount to an "obtaining" under section 90, par. s. There seems to be here an almost irreconcilable conflict.

Lands reserved for naval or military purposes.

3. Whenever any part of the Crown lands, which the company may require for their railway, are reserved for naval or military purposes, the company must first obtain a license under the hand and seal of the Governor General. But this license cannot be granted until a report has been made, approving of such license, by the naval or military authorities in which the lands are vested. (1)

Indian reserve land.

4. Again, it may be necessary for the railway company to take or use a portion of an Indian Reserve. This cannot be done without the consent of the Governor in Council; and the company must make compensation whenever they take or use any of such lands, or when any such are injuriously affected by the construction of the railway, the same as they would have to do in the case of lands belonging to private individuals or corporations. (2)

Lands of another railway.

5. In the construction and operation of the railway it may become necessary that the company should obtain a right of way over lands owned and occupied by another railway company, or they may require the use of the tracks, or portions of the tracks, or station grounds, or the lands of another railway company; and they are given power under the Act, with the approval of the railway committee on application, after notice to the other company, to take possession of, use and occupy any lands of such other company. The railway committee are empowered to give such order in connection therewith as they may think just in the public interest; and all the provisions of the Act with regard to

(1) Sec. 100. See, as to nature of title to such lands, *Grand Trunk Ry. Co. v. Credit Valley Ry. Co.*, 27 Grant's Chy. 232.

(2) Sec. 101.

the taking of land apply to such cases, both as to the power of taking lands and to the compensation to be given to the other company. (1)

6. In referring to the extent of land which may be taken by expropriation, without the consent of the proprietor or *in invitum*, it may be well to point out that the power to acquire land with the consent of the proprietors by voluntary deed or bargain (2) may be exercised before the deposit of the maps and plans, and before the setting out and ascertaining of the land required for the railway; and the contracts or agreements for such acquisition are declared to be binding at the price agreed upon, provided that the lands are afterwards set out and ascertained within one year from the date of the contract or agreement, and even though such land has in the meantime become the property of a third person; and possession may be taken and price dealt with as if fixed by award of arbitrators, and the agreement is declared to be in the place of an award. (3)

7. In the case of persons who cannot, in the ordinary course of law, sell or alienate lands which have been set out and ascertained, a fixed annual sum or rent must be agreed upon as an equivalent, and if the amount of this rent cannot be agreed upon, it is fixed by arbitrators in the manner hereinafter referred to, with regard to forced expropriation of property. (4) If any such annual rent is agreed upon, or determined, or any part of the purchase money remains unpaid, the railway property, and its tolls and revenues, are liable for the payment, in preference to all other claims, with the exception of those due to the Govern-

(1) Sec. 102.

(2) Sec. 90 (c).

(3) Sec. 141.

The deed of sale for the right of passage does not cover incidental damages arising from the works of a railway, unless such damages are expressly mentioned in the deed. *Cantin v. The N. S. Ry. Co.*, Q. B., 6 Sep., 1877, *Ram. Digest* 591.

Possession by a railway company of a person's land without his consent, or without making him a prior offer therefor, gives to the latter a recourse by petitory action against the company. *Cie. de Ch. de Fer Central v. Legendre*, 11 Q. L. R. 106, Q. B.

(4) Sec. 142. See *Brewster v. Mongeau & The M. & S. Ry. Co.*, M. L. R. 3 Q. B. 20, 10 L. N. 141, 15 R. L. 67, Q. B., 31 L. C. J. 115, Q. B., 1887, and *Supra* p. 79. Note.

ment for penalties and the working expenses of the railway, provided that the deed creating this charge is duly registered. (1)

Who may
convey lands.

8. It is provided by the Act that tenants in tail, or for life, guardians, or tutors, as they are called in Quebec, curators to incapable persons, executors, administrators, trustees, and institutes under substitutions, and all persons whosoever, not only on their own behalf and that of their heirs and successors, but also on behalf of those whom they shall represent, whether infants, issue unborn, lunatics, idiots, married women, or other persons seized, possessed of or interested in any lands, may contract and sell to the company the whole or any part of such lands. (2) But in case such persons have no right in law to sell the lands, they must obtain from a judge, after notice to the parties interested, an authorization to sell, and the judge may give such orders as are necessary for that purpose, and, if required, an order to secure the investment of the purchase money, in accordance with the law of the particular Province, in order to secure the interests of the owner. (3)

(1) Sec. 143. See *Brewster v. Mongeau & The M. & S. Ry. Co.*, *supra*, p. 79, note.

(2) Sec. 136. It was held by the Supreme Court, that under the somewhat similar provisions of C. S. C., cap. 66, s. 11, as explained and interpreted by 24 Vic., cap. 17, s. 1, a tenant for life was authorized to convey the interest of the remainder-man, but not to receive payment for the proportion of the purchase money representing such interest. *Midland Ry. Co. v. Young*, 16 L. N. 284; 22 S. C. R. 190, confirming judgment of the Court of Appeal, 19 O. A. R. 265; and see *Cameron v. Wigle*, 24 Gr. Chy. 8.

As to sale of infant's estate under former Acts, see *Dunlop v. Can. Central Ry. Co.*, 45 U. C. Q. B. 74.

(3) Sec. 137. An authorization to a curator to a substitution to sell real property affected by a substitution, unaccompanied by a similar authorization to a tutor *ad hoc* to such of the substitutes as are living, but incapable of acting, is insufficient. *Benoit v. Benoit*, 18 L. C. J. 286, S. C. 1874.

Every alienation or hypothec of the immovable property of a minor without judicial authorization is radically null. *Béliveau v. Barthe*, 7 R. L. 453, and see C. C. 297 and R. S. Q., art. 5794.

An appeal does not lie to the Queen's Bench from an order of a judge of the Superior Court homologating a family council, and ordering the sale of a minor's immovables. *Béliveau v. Clément & Chevretils*, 9 R. L. 664, Q. B.

Where land was conveyed to C. D. for life, with remainder to her children, and C. D., during the infancy of the children, agreed to sell and convey to a railway company for the purposes of its railway:—Held, that C. D., notwithstanding the provisions of sec. 136 of the Railway Act, had no right in law to sell; to get such right an order of a judge under sec. 137 was required; and where the proceeding was entirely for the benefit of the company, and no factious opposition was raised by anyone, the company should pay the cost of the order as part of the price of the land. *Re Dolsen*, 13 P. R. 84, and see *Wilson v. Graham*, 13 O. R. 651.

There might seem to be an apparent contradiction between this provision and that of sec. 142, which requires a fixed annual rent, and not a principal sum, to be paid, in the case of persons who have no power to sell in the common course of law. But this latter section would appear to apply only to contracts and agreements to sell under section 141, made before the deposit of the plan, and the setting out and ascertaining of the lands required for the railway; though why this distinction should be made is by no means clear.

9. These powers, in the case of executors who are not invested with power over the real property of the testator, administrators of persons dying intestate, and ecclesiastical and other corporations, and trustees of land for church or school purposes, can only be exercised with respect to such lands as are actually required for the use and occupation of the railway. (1)

Powers
limited in
certain cases.

10. But such a sale or conveyance, once made, or any contract or agreement to sell, made under these provisions, vests the company with an absolute title to the land, free from all trusts and restrictions whatsoever, and the person so selling, or agreeing to sell, is indemnified by the Act for whatever he may do under its provisions. (2) And it is further provided that the company shall not be responsible for the disposition of the purchase money, if paid to the owner of the land or into court for his benefit. (3)

Title of
company.

The effect of these sections would appear to be that, while the company may obtain a valid conveyance in fee simple from persons seized or possessed of lands in a representative or fiduciary character, such as those mentioned in sections 136 to 138, the purchase money must be paid to the real owner, or if he cannot be ascertained, or if for any other reason the company

(1) Sec. 138. The Rector of Woodstock filed a bill against the G. W. Ry. Co. for the specific performance of an alleged contract for himself and his successors as the consideration for certain rectory land conveyed by the plaintiff to the company for railway purposes.

The Court of Chancery decreed for the plaintiff.

The Court of Appeals not being satisfied with the evidence of the alleged contract, and also deeming the contract to be open to various objections, reversed the decree and ordered the bill to be dismissed with costs. *Bettridge v. The G. W. Ry.*, 3 U. C., E. & A. R. 58 (Grant).

(2) Sec. 139.

(3) Sec. 140.

sees fit, into court for his benefit. And probably the same interpretation would be given to these sections of the present Act, as was given to the provisions of C. S. C., cap. 66, on the same subject in *Midland Ry. Co. v. Young*; (1) where the language of the statute was almost in precisely the same terms as the present one.

As to mortgages, hypothecs and other encumbrances upon the property, the question is not without difficulty. In Quebec, the mortgagee has only a privilege or preference upon the proceeds of the property of his debtor, when it is brought to sale by process of law; (2) but the latter is not divested of his property, and may alienate it, subject, however, to the hypothec, which subsists upon the property notwithstanding the sale. (3) And the creditor of the hypothec may take an hypothecary action to bring the property to sale in the hands of any third holder, unless the latter prefer to pay his claim. (4) In the absence, therefore, of any express words in the Act extinguishing hypothecs upon lands sold to a railway company under these sections, the company would remain subject to the hypothecary action. There do not seem to be any such express words. Section 139 merely says that the sale shall vest in the company "the fee simple in the lands, freed and discharged from all trusts, restrictions and limitations"; which would seem to refer to such as are indicated in the preceding sections;—the words certainly do not include hypothecs and encumbrances. Section 140 only relieves the company from liability for the "disposition" of the purchase money when paid to the "owner." The word owner here is not to be taken in the sense of the definition given in the interpretation clause of the Act [sec. 2, par. (p)], but in its natural and ordinary meaning. (5) In Quebec the mortgagor does not cease to be the owner of his land, as above pointed out, and when he sells is under no obligation to apply the purchase price to the extinction of any hypothecs, as the purchaser takes the land subject thereto, leaving him only his recourse against the seller.

In the case of land taken *in invitum*, a distinction is made by the Act. The compensation stands in the place of the lands;

(1) 22 S.C.R. 190. (2) C. C. 2016.

(3) C. C. 2053. (4) C. C. 2058, 2061.

(5) *Young v. Midland Ry. Co.*, 19 O. A.R. per Osler J. A. at p. 275.

and any claim or encumbrance upon the lands is converted into a claim upon the compensation, for the amount of which alone the company is responsible, saving its recourse against the person wrongfully receiving the same. (1) So an hypothecary action would not lie against the company in such case, but merely a personal action for the amount of the compensation. (2)

In the Provinces where the principles of the English law prevail, the above reasoning would probably not apply; the position of the mortgagor and mortgagee being so radically different, (3) and the mode of enforcing the rights and remedies of the mortgagee so dissimilar. In Ontario it has been recently held, that where a railway company had fixed and settled the amount of compensation to be paid to the mortgagor of certain lands taken by the company, the mortgagees were entitled to a mandamus to compel the company to arbitrate as to the compensation payable to them in respect of the land mortgaged to them; inasmuch as the mortgagor could only deal with his own equity of redemption, and did not represent his mortgagees, and was not included in the enumeration of persons who, under sec. 13 of R. S. O., chap. 170, are enabled to sell or convey lands to the company. (4)

11. After the deposit of the plan, and after notice has been given in the newspapers as already mentioned, (5) ten days having elapsed, (6) the railway company may apply to the owners of lands, or persons empowered to sell, or persons interested in lands which may suffer damage from the exercise of the powers of the railway, for the purpose of acquiring their lands, or settling the compensation to be paid for the value of the property, or damages. (7)

12. If an agreement cannot be come to, the extent of land which can be taken from a proprietor without his consent is limited to 33 yards in breadth; except where the railway is raised

Agreement with proprietors, etc., after deposit of plan.

Land that may be taken without consent.

(1) Sec. 166.

(2) *Brunet v. Montreal & Ottawa Ry. Co.*, Q. R., 3 S. C. 445.

(3) See *supra* p. 122.

(4) *In re Toronto Belt Line Ry. Co. & Western Can. L. & S. Co.*, 95 C. L. T. 95; 26 O. R. 413.

(5) *Supra*, p. 76.

(6) One month, R. S. Q.

7) Sec. 144.

more than 5 feet higher, or cut more than 5 feet lower than the surface of the land, or where offsets are to be established, (1) or stations, etc., erected, or goods to be delivered, in which cases not more than 150 yards in breadth by 650 in length may be taken. (2)

Extra land.

13. If any more land is required for the accommodation of the public, or of traffic, or for protection against snow drifts, an application must be made and a plan submitted to the Minister, (3) and on application after notice supported by affidavit that the land is necessary for the purpose, and no other suitable land can be obtained at such place on reasonable terms, and with less injury to private rights, the Minister may grant the application, (4) and after the deposit of the plan, and the giving of the Minister's certificate, the company may proceed to take the extra extent of land, in the same manner as any other lands. (5)

Occupying
land for
construction
purposes.

14. The company, either for the purpose of constructing or repairing its railway, or for the purpose of carrying out the requirements of the railway committee, or in the exercise of the powers conferred upon it by the railway committee, may enter upon any land which is not more than two hundred yards distant from the centre of the located line of the railway, and may occupy the said land as long as is necessary for the purposes aforesaid; but before entering upon any land for the purposes aforesaid, the company shall, in case the consent of the owner is not obtained, pay into the office of one of the Superior Courts of the Province in which the land is situated, such sum, with interest thereon for six months, as is, after two clear days' notice to the owner of the land, or to the person empowered to convey the same or interested therein, fixed by a judge of any one of such Superior Courts. (6)

Power to take
materials for
construction.

15. Whenever stone, gravel, earth, sand or water is required for the construction or maintenance of the railway, the company may, if it cannot agree with the owner of the land on which the

(1) Double tracks, R. S. Q. (2) Sec. 103; 250 yds., R. S. Q.

(3) Secs. 106, 107.

(4) Secs. 107-109.

See *Lon., Brighton & South Coast Ry. Co. v. Truman, L. R., 11 App. Cas. 45.*

(5) Secs. 110, 111.

(6) Sec. 112.

same are situated for the purchase thereof, cause a land surveyor, or an engineer, to make a map and description of the property so required, and serve a copy thereof, with a notice of arbitration, as in the case of acquiring the roadway; and such proceedings may be had by the company, either for the right to the fee simple in the land from which the material is taken, or for the right to take material at any time it thinks necessary,—and the notice of arbitration, if arbitration is resorted to, shall state the interest and powers required. (1)

16. Whenever any stone, gravel, earth, sand or water is so taken at a distance from the line of the railway, the company may lay down the necessary sidings, water pipes or conduits and tracks, over or through any lands intervening between the railway and the land on which such material or water is found, whatever is the distance, and all the provisions of the Act, except such as relate to the filing of plans and publication of notices, shall apply, and the powers thereby granted may be used and exercised to obtain the right of way from the railway to the land on which such materials are situated; and such right may be acquired for a term of years, or permanently, as the company thinks proper; and these powers may, at all times, be exercised and used in all respects, after the railway is constructed, for the purpose of repairing and maintaining the railway. (2)

17. Whenever, for the purpose of securing sufficient land for stations or gravel pits, or for constructing, maintaining and using the railway, any land may be taken under the compulsory provisions of the Act, and by purchasing the whole of any lot or parcel of land over which the railway is to run, or of which any part may be taken under those provisions, the company can obtain the same at a more reasonable price or to greater advantage.

(1) Sec. 113.

Held, that a judge may grant his warrant to put a company in immediate possession of land from which material is required to be taken for construction purposes. *Joly v. Moreau*, 2 L. N. 284.

(2) Sec. 114.

An injunction lies against a railway company which has taken land without the formalities required by the Act; and the writ can be taken at the instance of one of the joint proprietors even when the other owner had consented to the possession by the company. *Beauharnois Junction Co. v. Bergevin*, 17 R. L. 113, Q. B.; *Beauharnois Junction Co. v. Hainault*, 17 R. L. 116, Q. B.

tage than by purchasing the roadway line only, or only such part, the company may purchase, hold, use or enjoy the whole of such lot or parcel, and also the right of way thereto, if the same is separated from the railway, and may sell and convey the same or any part thereof, from time to time, as it deems expedient ; but the compulsory provisions of the Act do not apply to the taking of any portion of such lot or parcel not necessary for these purposes. (1)

Procedure in
case of disa-
greement.

18. Any questions which may arise in case of disagreement as to the value of the lands to be acquired, or the damages which may be caused by the exercise of the powers of the railway with regard to any lands, are settled in the following manner :

Notice.

19. The railway company serves a notice upon the interested party, which must contain a description of the lands to be taken, or the powers intended to be exercised by the railway with regard to the lands (describing the lands with regard to which such powers are to be exercised), and a statement of the amount which the company is ready to pay as compensation for such lands, or for such damages, and the name of a person to be appointed as arbitrator (2) of the company, if the offer is not accepted. (3) This notice must be accompanied by the certificate of a sworn provincial land surveyor or engineer. The surveyor or engineer, as the case may be, must be a disinterested person, and not the arbitrator named in the notice.

This certificate, signed by the surveyor or engineer, must state that the land is required by the railway, or within the limits of deviation allowed by the Act ; that he knows the land in question or the amount of damage likely to arise from the exercise of the powers ; and that the amount offered by the company is, in his opinion, a fair compensation for the land and for the damages. (4) This notice, accompanied by the certificate, is served upon the party, either personally or at his domicile. If he is absent from the county or district in which the lands are situated, or is

(1) Sec. 115.

(2) A railway company, in serving an expropriation notice, is merely bound to give the name of their arbitrator, without any indication as to his residence or occupation. *A. & N. W. Ry. Co. v. Dunn*, 10 L. N. 26.

(3) Sec. 146.

(4) Sec. 147.

unknown, or cannot be found, the company applies to a judge, (1) producing the certificate and affidavit of some officer of the company, establishing that the person is absent, or after diligent inquiry cannot be found, or that it cannot be ascertained who the owner is, and thereupon the judge may order a notice to be inserted three times during the course of one month in a newspaper published in the district or county in which the land is situated, or if there is no newspaper published there, in one published in some adjacent district or county. (2)

The notice having thus been served, either personally or by advertisement, the opposite party is bound to give notice to the company as to whether he accepts or refuses the offer, and if he refuses, he must give the name of his arbitrator; he must do so within ten days of the service on him of the notice, or within one month after the publication of the advertisement; and if he does not do so within that delay, the company may apply to a judge, who shall upon such application appoint some person to be sole arbitrator for fixing the compensation. (3) If, on the other hand, the proprietor, or opposite party, as he is called in the Act, names his arbitrator, then the company's arbitrator and the proprietor's arbitrator (as we shall call him hereafter) agree upon a third; and if they cannot agree, the judge, on application of either party, after six clear days' notice, appoints a third arbitrator. (4)

20. These three arbitrators are thus chosen for the purpose Arbitrators. of fixing the indemnity, or compensation,—as it is called by the Act,—to the proprietor of the lands taken or damaged by the railway. (5)

It is provided by article 407 of the Civil Code of Quebec that no one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid. This principle will be found underlying the constitution of most civilized States, and is one which is fundamental to the liberty of the subject. In this country, where the Legislature is supreme, and is not shackled in the exercise of its will in such matters by any provisions of a written constitution, as in most

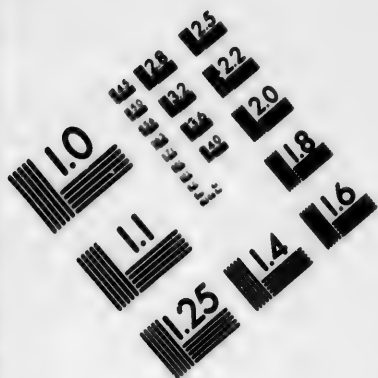
(1) Sec. 148.

(2) Sec. 149.

(3) Sec. 150.

(4) Sec. 151.

(5) Sec. 152.



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of the United States, yet, while great powers of eminent domain have been given to Railway Companies over the property of private individuals, ample provision has been made for their being fully compensated for all loss which they may suffer by the exercise of such powers. (1) And the Act provides the means, through arbitration, by which this compensation is to be ascertained and determined. It remains to be considered how this compensation is to be arrived at, and what kind of damages may be assessed by the arbitrators, and what persons are entitled to recover compensation under the Act.

The three arbitrators, or the sole arbitrator, if a sole arbitrator has been appointed under the Act, must be sworn before a Justice of the Peace, to faithfully and impartially discharge their duties; and proceed to ascertain such compensation in such way as they, or he, or a majority of them shall deem best. (2) Thus a large discretion is given to the arbitrators as to the manner in which they shall ascertain the compensation.

First Meeting. 21. At their first meeting, the arbitrators, or a majority of them, are required by the Act to fix a day on or before which the award shall be made, and it is provided that if the award is not made on or before the day so fixed, or some other day to which the time for making it has been prolonged, either by consent of the parties or by resolution of the arbitrators, then the amount offered by the company by their notice of expropriation shall be the compensation to be paid. (3)

(1) Sec. 92.

(2) Sec. 152. In Lower Canada, notaries have power to receive the report of arbitrators to give certified copies of the oath of arbitrators annexed thereto, and such power is specially recognized as belonging to them by the Statutes 2 Will. IV. cap. 58, and 13 and 14 Vic., cap. 114 (S.C. judgt. reported 4 L. C. R. 189, Reversed). Roy and The Champlain & St. Lawrence Ry. Co., 6 L.C.R. 277 (Q. B. 1856).

(3) Sec. 156.

An award of arbitrators and *amiable compositeurs*, not signified on the parties interested until after the delay limited by the agreement for the rendering of the award, is null and void, notwithstanding such award may have been rendered within the prescribed time. Chapman v. Hodson, 9 L. C. J. 112, S. C. 1864.

That in consequence of default of service of an award within the delay fixed by law and by the terms of the compromise, the award was absolutely null and of no effect. Blanchet v. Charroon, 4 L. C. J. 8 (Q. B. 1842).

Arbitrators must not only hear the parties, but must decide the matter in dispute before the expiration of the rule of reference; their proceedings are

22. The arbitrators must examine on oath or solemn affirmation, the parties, or such witnesses as may appear before them. Examination of witnesses
They have power to administer the oath or affirmation themselves.

otherwise void. *Gilley v. Miller*, 1 Step. Dig., p. 104, § 765, 1 Rev. de L. 510.

Where the parties through their respective attorneys consent to extend the time for making an award under a rule of reference, such consent does not operate as a new submission, but is an enlargement of the time under the rule and a continuation of the extended period of the authority of the arbitrators, and therefore an award made within an extended period is an award made under the rule, and is valid and binding. *Oaks v. The City of Halifax*, 4 S. C. R. 640, Cass. Dig. 34 (New Edit.).

According to the Act 43-44 Que., cap. 43, sec. 9, §§ 22, "a majority of the arbitrators at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made. An omission to do so will render the award null and void. *N. S. Ry. Co. v. Beaudet et al.*, 1 Q. L. R. 239 et 241, Q. B.

(N. B.—This judgment was taken to the Supreme Court, where the award was upheld, but on a different point; the question of fixing a day at the first meeting does not appear to have been discussed by the Supreme Court. Vide 11 L. N. 35; 15 S. C. R. 44.)

The Railway Act does not require that the award should show on its face that a day has been fixed on or before which the award had to be made, or that it was made within the time so fixed; it is sufficient that it should be proved that as a matter of fact such time was fixed and that the award was made within the delay. *Benning v. The A. & N. W. Ry. Co.*, M. L. R., 5 S. C. 136. Affirmed in appeal M. L. R., 6 Q. B. 385, and Supreme Court, 20 S. C. R. 177.

Under Ky. Act 1879, 42 Vic., cap. 9, where the arbitrators appointed to fix the compensation for a property adjourned to a day subsequent to that originally fixed for making the award, without stating in their minutes that such adjournment was for the purpose of making an award, and at their subsequent meeting the three arbitrators and counsel for the parties were present, and no objection was made to the regularity of the meeting, such absence of objection was held to constitute a tacit ratification of the proceedings up to that time. *O. & Q. Ry. Co. v. Curé, etc.*, de St. Anne, M. L. R., 7 Q. B. 110.

Cause referred at *nisi prius*, and verdict taken for plaintiff subject to a reference, award to be made by a certain day, with power to the arbitrators to enlarge the time; they did enlarge it once, but no award was made, and after that day was passed, defendant's attorney was asked by plaintiff's attorney to consent to a further enlargement, and declined, no application had been made to the arbitrators. The Court held they could do nothing more than set aside the verdict. *Moulson v. Eyre*, 5 U. C. Q. B. 470.

A cause was referred, the award to be made before 1st July, with leave to the arbitrator to enlarge, but no verdict was taken. He enlarged until August 2nd, and after hearing the evidence he adjourned to the 4th, to enable defendants to procure their witnesses.

Neither party attended again, or took any steps to procure a further enlargement, and plaintiff gave notice of trial. Defendants pleaded that the order of reference was yet in force, but the plaintiff went on and took a verdict, defendants not appearing.

Held, that defendants, if they desired the reference to continue, should have applied for an enlargement before the verdict, and that by omitting to do so they had waived their right; but under the circumstances the verdict was set

selves. (1) It will be observed here, that the Act does not give

aside without costs upon affidavit of merits. *Miller v. Hogg*, 2 P. R. (Ont.) 299.

Where a submission is that an award shall be delivered by a certain day, if it be ready for delivery by that day it is sufficient. *Galbraith v. Walker*, E. T., 2 Vict. Ont. Digest, p. 138.

After expiration of the time limited, arbitrators cannot, without (even if they can with) the consent and concurrence of both parties to the submission, make a binding award. *Ruthven v. Ruthven*, 8 U. C. Q. B. 12.

A verbal consent to an enlargement of the time for making an award is sufficient under C. L. P. Act, § 171. *Jones v. Prentice*, 2 Can. L. J. N. S. 205.

When there has been an agreement between two parties giving power to a third, within a certain time, an award on a matter of difference between them, if the award is not made within the specified time, but one of the parties not knowing that fact takes it up and pays the charge for it, his doing so will not amount to a waiver of the condition as to time, contained in the agreement.

Quære, whether taking up an award known to have been made after the limited time would amount to an admission that the arbitrators' authority had not expired. *Earl of Darnley v. London, Chatham & Dover Ry. Co.*, L. R., 2 H. L. 43.

(1) Sec. 155.

An award is not null because the witnesses have not been legally sworn. *Tremblay v. Tremblay*, 3 L. C. R. 482 (S. C. 1853).

In an action brought upon an award of arbitrators, the defendant may contest the validity of the report which does not set forth that the witnesses were heard, by alleging that the arbitrators refused to hear the witnesses, and such defendant will be allowed to prove such refusal. *Ostell & Joseph*, 9 L. C. R. 440, Q. B. (1857).

An award of arbitrators under a rule of Court will not be set aside on a motion (supported by the affidavit of the defendant), on the ground that the award was not accompanied by satisfactory evidence that the trustees or their witnesses were legally sworn; it appearing that the oath was administered to the parties and their witnesses by one of the arbitrators. *Daly v. Cunningham*, 6 L. C. J. 242, S. C. 1862.

A report of arbitrators will be set aside and annulled on motion, when it appears that a material witness gave evidence before the arbitrators without having been legally sworn. *O'Connell v. Frigon*, 9 L. C. J. 173 (S. C. 1865).

An award that does not state that the parties had been heard before the sole arbitrator, or had an opportunity to urge their respective pretensions, was held to be defective, and was rejected on motion. *Farmer v. McNeil*, 1 L. N. 220; 22 L. C. J. 76, 1878.

Where arbitrators appointed to value a property proceeded upon an erroneous basis in law, and refused to admit the best evidence of value, an interested party may obtain a writ of *mandamus* against the arbitrators to compel them to admit the evidence. *Jones v. Laurent*, 8 L. N. 341; M. L. R., 1 S. C. 438, 1885.

See *S. E. Ry. Co. v. Gouvernement*, 15 R. L. 258 (Q. B. 1887).

The fact that the arbitrators and the witnesses were sworn may be established by the declaration in the award itself, setting forth that they were sworn,—more particularly where no objection was made at the time by the arbitrator who represented the party objecting to the validity of the award. *Mills v. The A. & N. W. Ry. Co.*, M. L. R., 4 S. C. 303.

any power to arbitrators, or to the parties, to summon witnesses or to compel witnesses to attend before the arbitrators; it is only those witnesses who voluntarily appear before them whom they must examine.

The evidence of the witnesses is required to be taken in writing as depositions, and the arbitrators are required, on the request of either party, to transmit the depositions of the witnesses, with all papers and exhibits referred to and connected with the proceedings, except the award itself, to the clerk of the court. (1) Under the Quebec Act, and under the Railway Act anterior to the one now in force, there was no such provision as this; it was not required that the evidence of witnesses should be taken in writing, nor that the arbitrators should transmit any papers or notes of evidence to the court.

There may be a seeming contradiction between the provisions of section 152, giving the arbitrators power to ascertain the compensation in such way as they may deem best, and those of 155, which require them to examine the parties and witnesses under oath. The language of section 152, so far as referred to, is identical with the language of the corresponding section in the Act preceding the one now in force, and in adding section 155, which was put in for the purpose of bringing before the court, upon an appeal from the award, the evidence taken, the effect of the two sections was apparently not considered; but we must construe them to mean that while the arbitrators must take the evidence of the parties, if offered, and the evidence of any witnesses produced before them, they shall, with the assistance of such evidence, ascertain the compensation as they may deem best.

23. It is provided by section 152 that the award of the arbitrators, or the majority of them, shall be final and conclusive, except as afterwards provided. Award final.

24. This refers to the provisions of section 161, which gives an appeal, upon any question of law or fact, to the Superior Court, with the proviso that this right of appeal shall not affect the existing law or practice in any Province as to setting aside awards. The questions touching this appeal and the setting aside of awards will be considered later. (2) Appeal from award.

(1) Sec. 155, ss. 2.

(2) Post. p. 202.

Arbitrators
must act at
meeting.

25. The award of the arbitrators cannot be made, nor can any official act be done by a majority, except at a meeting of which each of the arbitrators has received at least two clear days' notice, or to which some meeting at which the absent arbitrator had been present had been adjourned. No notice is required by the Act to be given to either of the parties of any meeting of the arbitrators; the notice to the arbitrators appointed by the party is held to be sufficient. (1)

Vacancy
among
arbitrators.

26. If any vacancy should occur amongst the arbitrators named by the parties before the award is rendered, by reason of the death of either of them, or by reason of one of them refusing or failing to act, within a reasonable time, another arbitrator may be appointed by either of the parties in place of his arbitrator; (2) or if it is the office of the sole arbitrator or the third arbitrator which is rendered vacant, by the above mentioned causes, or through disqualification, his place is supplied either by agreement between the two arbitrators as to a third arbitrator, or by a person named by the judge, as provided in the case of original appointment. And no recommencement or repetition of the previous proceedings is required. (3) It has been held, under this section, that the judge has no power to appoint an arbitrator for either party, or to replace the arbitrator of either party who has resigned. (4)

Disqualifica-
tion of
arbitrators.

27. As to the disqualification of arbitrators, it is provided by section 159, that the person named as valuator or sole arbitrator shall not be disqualified, unless he is personally interested in the amount of the compensation, even though he is professionally employed by either party, has previously expressed an opinion as to the amount of the compensation, or even though he is related to the proprietor or to any shareholder in the company. And it has been held that the fact that the third arbitrator represented the company, after the award in other similar proceedings, forms no legal ground of disqualification. (5) No objection to the sole arbitrator, or to the third arbitrator appointed by a judge, can be made after his ap-

(1) Sec. 152.

(2) Sec. 157.

(3) Ibid.

(4) Ont. & Que. Ry. Co. v. Latour, M.L.R., 4 S.C. 84 (S.C. Que. 1888).

(5) Benning v. A. & N.W. Ry. Co., M.L.R., 5 S.C. 136 & 6 Q.B. 385.

pointment; and any cause of disqualification must be urged before the judge at the time of the application for appointment, and the question is there and then decided summarily by the judge. (1) Should the disqualification be pronounced, another person may be appointed by a judge upon application of either party. (2) As to the arbitrators appointed by the parties, any cause of disqualification must be urged before the appointment of the third arbitrator; and the judge determines the question summarily on the application of either party after two days' notice to the other. (3) This section does not provide what shall or shall not be valid grounds of disqualification of an arbitrator appointed by the parties, as sec. 159 does in the case of an arbitrator appointed by the judge. But the provisions of that section should *a fortiori* apply. It has been held that the rendering of services, as a notary, to one of the parties would not disqualify such notary from acting as arbitrator for such party; (4) and in the Supreme Court, that, as the evidence showed that the arbitrator was not in the continuous employ of the parties expropriated, but merely acted for them, from time to time, in his professional capacity as a notary, and not in any other capacity, he was not disqualified. (5)

The party expropriated cannot object to the arbitrator named by the company, on the ground of his relationship to the surveyor whose certificate accompanied the offer made by the company, nor on the ground of alleged inexperience. (6)

In case of the disqualification of an arbitrator appointed by either party, the party who proposed the disqualified arbitrator shall be held not to have appointed an arbitrator, (7) and the consequence would appear to be that the arbitration should be proceeded with by a sole arbitrator appointed by the judge on the application of the company. (8) The Act might be clearer on this point; but there is certainly no provision for the appointment by the party of an arbitrator to replace one disqualified, the

(1) Sec. 159.

(2) Sec. 157.

(3) Sec. 160.

(4) *The North Shore Ry. Co. v. Les Ursulines de Québec*, Ramsay's Digest 60 (Q. B. Que. 1884).

(5) *Cassels Dig.*, p. 36 (S. C. of C., 5th March, 1885).

(6) *Benning v. A. & N. W. Ry. Co.*, M. L. R., 5 S. C. 136, and 6 Q. B. 385.

(7) Sec. 160.

(8) Sec. 150.

only provision for thus filling a vacancy being in the case of the death or failure to act of one or other of the arbitrators named by the parties. (1)

Arbitrators,
how to be
guided in
making
valuations.

28. We shall now consider on what grounds as to compensation the arbitrators are to base their award.

The arbitrators, in fixing the compensation to be paid to a proprietor any part of whose land has been taken by the company, are bound to consider both the value of the land taken and the damages which may be caused to the remainder of the property by the exercise of the powers of the railway. (2)

Increased
value to
remainder of
land.

29. They are bound to take into consideration the increased value that may be given to the remainder of any land, a portion of which is taken by the road, by reason of the passage of the railway through or over the same, or of the construction of the railway, and are bound to set off this increased value, if any, against any inconvenience, loss or damage that may be sustained by reason of the company taking possession of and using the property. (3) This provision of the Act would appear at first sight to be almost a contradiction in terms, for if loss or damage is sustained on account of the company using a portion of the property, it is hard to see how the remainder so damaged could be increased in value; but the intention of the Act is to provide for a case where, though the proprietor may suffer a certain amount of inconvenience and loss, for instance by the severance of one portion of his farm from another, yet the remainder of his land may be increased in actual market value by reason of the railway being constructed there. In such a case the increased value is set off against the loss and inconvenience.

(1) Sec. 157.

(2) Secs. 144, 146, 152. The amount awarded for the right of way for a railway company is compensation under secs. 146, 147, 152 of The Railway Act. 51 Vic., cap. 29. not only for the land taken by the railway, but also for the damages likely to be occasioned to the proprietor during the construction of the railway. *Evans v. A. & N. W. Ry. Co., M. L. R., 6 S.C. 493.* Railway companies have the right under The Railway Act to fell and remove trees which stand within six rods of the railway, and the damage which may result from the exercise of this right forms part of the damages to be covered by the compensation awarded to the person whose land is expropriated, and he has no action to recover any additional amount for the value of trees within this limit which may be cut down and removed by the railway company.—*(Ibid.)*

(3) Sec. 153.

It has been held in the United States that this increase in value must be a special benefit or increase peculiar to the property in question, and not a general increase in value common to all the properties in the neighborhood. (1) It is often the case that the construction of a railway in a particular locality will increase the value of land generally within a certain radius, and this increase, it has been held, cannot be set off against the loss or damage caused to the property of any particular proprietor; (2) but, under the language of our Act, it would seem as if such increase in value could be set off and must be set off by the arbitrators. The language is general, covering all increase in value that may be given to any lands through or over which the railway will pass, by reason of the passage of the railway, or by reason of the construction of the railway. Of course, particular properties might be especially benefited or increased in value by the construction of the railway, that is, by the works in connection with its building, which might have a beneficial effect upon the property; as, for instance, giving the land better drainage; but the passage of the railway could not benefit one particular property without benefiting and increasing in value those in its immediate neighborhood, in a greater or less proportion; and, therefore, under the language of the Act, which requires the arbitrators to set off the increased value caused by the passage of the railway, it appears to be impossible to say that they must not take into consideration a general increase of value benefiting properties in general in the vicinity of the road. It would indeed be inequitable to hold that while the construction and passage of a railway through or over a property might largely increase its value, yet the railway company would be compelled to pay damages for the inconvenience caused to the proprietor, without any consideration being taken of the increase in value to his land. In other words, the proprietor would not only benefit by the increased value of his pro-

(1) *Lewis, Eminent Domain*, § 471; *Mills*, §§ 152, 153.

(2) *Ibid*; and see *Betts v. Williamsburgh*, 15 Barb. 255; and as to what are and are not special benefits, see *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen (Mass.) 115; *Pittsburgh & Lake Erie Ry. Co. v. Fobinson*, 95 Pa. St. 426; *Washburn S. Milwaukee & L. W. R. R. Co.*, 59 Wis. 364; *Minn. Central R. R. Co. v. Macnamara*, 13 Minn. 468; *Paine v. Woods*, 108 Mass. 160; *Childs v. New Haven & Northampton R. R. Co.*, 133 Mass. 253.

party, in common with his neighbors, whose lands were not taken, and who yet might suffer inconvenience from the passage of the railway for which they could not recover indemnity, but he would also receive indemnity for the particular inconvenience or loss which he might suffer.

It frequently happens that while the expropriated party may suffer damages through the inconvenience he is put to by the passage of the railway through his land, yet the remainder of his land is increased in value, along with the properties in the vicinity, by the mere presence of the railway. In the case of *Benning v. The Atlantic & North West Railway Company*, (1) the Court of Appeals in Quebec, confirming the decision of the Superior Court, held that such increase of value might be taken into consideration and set off against the damages.

This case was taken to the Supreme Court, where the judgment was confirmed. (2) In that Court, though, the point was not specially dwelt upon; the Court held that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it and its value after the railway had been constructed, and upheld the award.

In Ontario, one of the judges of the Court of Appeals there has held, in a case of *James v. The Ontario & Quebec Railway Co.*, (3) that what was intended by a similar section in a previous Act (4) is a direct and peculiar benefit accruing to the particular land in question, and not the general benefit to all land owners resulting from the construction of the railway. This may be looked upon as an *obiter dictum*, it having been unnecessary for the decision of the particular case; and the other judges refused to pass upon the point, the Chief Justice (Hagarty, C. J.) saying that the question involved the consideration of several decisions of Ontario Courts, and that he would prefer to leave it open till it should arise. (5) In a previous Ontario case, (6) the principle had been recognized that when the act proposed to be done gives increased value to the land, such increased value must be allowed. The dictum of Judge Burton

(1) M. L. R., 6 Q. B. 385.

(2) 20 S. C. R. 177.

(3) 15 O. A. R. 1.

(4) R. S. C., cap. 109, sec. 8, par. 21.

(5) 15 O. A. R. at p. 13.

(6) In re Can. Southern Ry. Co. & Norvall, 41 U. C. Q. B. 195.

in the James case may have been influenced by the opinion which he seems to have held, that the increase in value might be set off against the value of the land taken, as well as against the damages. (1) This opinion could not be sustained under sec. 153 of the present Act, which distinctly says that the increased value is to be set off against "the inconvenience, loss or damage" that may be suffered. And though the same opinion is expressed by Mr. Lewis in his work on Eminent Domain, (2) it is ably combatted by Mr. Mills, (3) who says that the fairest rule is to set off the benefits against disadvantages, only allowing the owner to recover any excess of disadvantages over benefits; but not allowing the excess of benefits to reduce the claim for the actual value of the land and materials taken. If the increased value could be set off against the land taken, it would be unjust, as Mr. Lewis argues (4) that one person shou'd be obliged to pay for general advantages by a contribution of land, while his neighbor, whose property is not taken, enjoys the same advantages without price. But where, as under our Act, there is no contribution of land, the full value of the land taken being paid by the railway company, (5) there could be no injustice in setting off, against the damages suffered by the proprietor, the increased value of the remainder of his lands, even though such increase in value were a general one and common to the lands in the neighborhood.

This question has been considered in two cases in the Exchequer Court arising under the provisions of the Government Railways Act, 1881. (6)

Sec. 16 of that Act reads as follows :

"The arbitrators shall consider the advantage as well as the disadvantage of any railway, as respects the land or real estate of any person through which the same passes, or to which it is contiguous, or as regards any claim for compensation for damages caused thereby; and the arbitrators shall, in assessing the value of any land or property taken for the purposes of any railway, or in estimating the amount of damages to be paid by the depart-

(1) 15 O. A. R. at p. 3.

(3) Mills' Eminent Domain, § 158.

(5) Post p. 160.

(2) p. 606.

(4) Lewis, § 471.

(6) 44 Vic., cap. 25.

ment to any person, take into consideration the advantages accrued or likely to accrue to such person or his estate as well as the injury or damages occasioned by such work."

Commenting on this section, Mr. Justice Burbridge, in the case of *The Queen v. Carriere*, said: (1) "The language of this provision is apparently large enough to include not only the special and direct benefits arising from the position of a property on the line of a railway, but also the general benefit not arising therefrom, but from the facilities and advantages caused by the railway which affect all the estates in the neighborhood equally, and which are shared in common with such estates. I apprehend, however, that the narrower is the true construction of the provision, and that the advantages accrued or likely to accrue should be limited to those which are special and direct, (2) and, in a case like the one under consideration, to such as arise from increased conveniences for carrying on business, because of the opportunity of connecting the property with the railway by tracks and sidings." And, in a subsequent case of *Paint v. The Queen*, the same learned judge expressed himself as follows: (3) "It is not denied that the property as a whole is benefited by the construction of the railway. On this point the witnesses, speaking generally, agree. But it is said that the advantages accruing therefrom are common, at least, to all the owners of lots in the town of Guernsey, and therefore ought not to be considered for the purpose of cutting down the damages to which the claimant would otherwise be entitled. It is true, I think, that the enhancement in value resulting from the construction and proposed operation of the railway is common to all the property in the town, but such benefits may, nevertheless, fall within the rule as to special, as contra-distinguished from general, advantages. (4) Here, again, I think that the unity of the estate should be regarded. The claimant is the founder of the town. He still owns or is interested in more than two-thirds of the lots into which he has divided it. The Government makes it the terminus of the Cape Breton Railway, and constructs, within its limits, stations, freight-

(1) 2 Exchq. Rep. at pp. 45-6.

(2) Quoting Sutherland on Damages, Vol. III, pp. 452-3-4.

(3) 2 Exchq. Rep. at pp. 155-6.

(4) Sutherland on Damages, Vol. III, p. 454.

sheds, round-houses, wharves and all the works usually found at a terminus. That certainly is an advantage, and I think a special advantage to the claimant and to the property. If the Act to which I have referred does not apply to such a case, it would, I think, be difficult to suggest a case to which it would apply."

This last judgment was confirmed on Appeal to the Supreme Court. (1)

In both these cases, it will be observed, the judge in the Exchequer Court allowed the set-off of advantages special to the property, but was of the opinion that if the advantages had been general (which it was held they were not) then no set-off would be allowed. This latter opinion, which was hardly necessary for the decision of the case as the set-off was allowed, would be supportable on the argument of Mr. Lewis above referred to, (2) inasmuch as the section of the Act cited appears to contemplate the set-off of advantages against the value of the land, and therefore the party expropriated would be in the position of paying for these advantages by a contribution of land. For the arbitrators are directed, in assessing "the value of the land" or the damages to be paid, to take into consideration the advantages accrued, or likely to accrue, as well as the injury or damage.

However, the learned judge in the Exchequer Court seems to have construed this clause, (3) as allowing a set-off only against damages. If this construction be correct and applicable to the Railway Act, then these decisions conflict with that of *Benning v. The A. & N. W. Ry. Co.* (4) already referred to.

In view of these conflicting decisions, and until we have a final holding by the Supreme Court, the true interpretation to be placed upon this section of The Railway Act may be said to be doubtful.

In the event of its being allowed, the increased value must be set off against any damage which may be caused to the property, and not against the value of the land. (5) For instance, should the arbitrators find there was no damage, loss or inconvenience to the property caused by the railway, and that the proprietor

(1) 18 S. C. R. 718 |

(2) Supra p. 157.

(3) 2 Exchq. Rep. at p. 47 and at pp. 155-6.

(4) M. L. R., 6 Q. B. 385; 20 S. C. R. 177.

(5) Sec. 153, and see Mills Eminent Domain, § 158.

was only entitled to the actual value of the land taken, they would not be justified in setting off any increase in value in the remainder of the land against the value fixed for the land taken itself. It has been authoritatively held, that the true method of fixing the compensation is to take the value of the whole property as it was at the time of the deposit of the plan, for that is the date with reference to which the compensation is to be fixed, and ascertain the value of the remainder of the land, after the passage of the railway, and the difference is the compensation to be paid to the proprietor. (1) This seems to be an eminently fair and equitable method of ascertaining the compensation, and immediately does away with the many difficult questions which have arisen as to the different grounds of damage which may be considered by the arbitrators in fixing the compensation.

Take the instance of a farm of 100 acres. If the arbitrators can fairly say that this farm was worth \$10,000 at the time of the deposit of the plan, and that, the railway company having taken two acres in superficies out of it, the remainder is only worth \$9,400, they at once arrive at a fair compensation to the proprietor, by taking the difference of \$600, or whatever difference they may find to exist in the value of the farm. This principle, however, is subject to one qualification, namely, that they must always pay the proprietor the actual value of the land taken. (2) It might happen that the construction of the railway would increase the value of the remainder of the property, even to such an extent that the remaining portion would be worth more than the whole property as it originally stood, yet the arbitrators must award the proprietor the full value of the piece of land taken, but in such a case they would not be authorized to give him anything for damages resulting from inconvenience, etc. If this rule, with the qualification mentioned, were generally adopted, it would avoid the difficulty under section 153 as to the setting off of the increased value; for the arbitrators would simply look at the difference in value between the whole property as it originally stood, and the remainder of it after being mutilated by the railway company. (3)

(1) *Benning v. A. & N. W. Ry. Co.*, 20 S. C. R. 177; *The Queen v. Carrier*, 2 Exch. Rep. at pp. 44-45; *Ont. & Que. Ry. Co. v. Taylor*, 6 O. R. 348; *James v. O. & Q. Ry. Co.*, 12 O. R. 624; 15 Ont. A. R. 1; *Paradis v. The Queen*, 1 Exch. Rep., per Taschereau J., at pp. 222-23.

(2) *Supra*, p. 157. (3) *O. & Q. Ry. Co. v. Taylor*, 6 O. R. at p. 348.

In England there is no provision in the Imperial Acts similar to that contained in sec. 153 of our Act, nor any provision allowing benefits or advantages to be set-off against the value of the land or damages. In the case of *Senior v. The Metropolitan Railway*, (1) such a set off was claimed, but refused by the court, on the ground that the value of the land must be paid for, irrespective of any benefit that might accrue to the remainder by the construction of the railway. It was thus put by Wilde B. : (2) "I desire to protest against the idea that in assessing compensation a railway company can claim a set-off by reason of a benefit their works may have done the neighborhood. No doubt a railway does improve a neighborhood, and everybody is entitled to the advantage of that improvement; but if any individual has a portion of his land taken, he is entitled to be paid for it." This is in accord with the principle above stated, that in any event the value of the land taken must be paid; but is not applicable to a case where it is sought to set off the enhanced value of the remaining land against damages under our Act.

30. In arriving at their award, the arbitrators have the right to take into consideration, in the language of the Act, "the inconvenience, loss or damage that may be suffered or sustained by reason of the company taking possession of or using the lands." (3)

Lands
injuriously
affected by
the construction
of the
railway.

In England, statutory compensation is given to the owner of lands "injuriously affected by the construction of the railway," to use the language of the English Act. (4) And it has been held by the Privy Council, in *The Corporation of Parkdale v. West*, (5) that the Consolidated Ry. Act of 1879 places

(1) 32 L. J. Ex. (N. S.) 225.

(2) *Ibid.* at p. 230.

(3) Sec. 153.

(4) 8 Vic., Cap. 20, secs. 6 and 16.

(5) 12 App. Cas. 602.

By 46 Vic., ch. 45, provision was made for the construction of a subway as a means of crossing certain railways entering Toronto, part of which had to be constructed within the city, and within the municipality of Parkdale; the city and village could not agree upon terms, so the latter united with the railways in obtaining an order-in-council under 46 Vic., cap. 24, authorizing the companies to execute the work, and by agreement the village authorities agreed to do the work for the railway company.

In an action against the village by proprietors in the city and village on

on the same footing, as far as expropriation proceedings are concerned, the taking of land and the interference with rights over land; and includes provisions for compensation in respect of land injuriously affected though not actually taken; and that the payment of compensation by the railway company is a condition precedent to its right of interfering with the possession of land or the rights of individuals. This case was followed by that of *Pion v. The N. S. Ry. Co.*, (1) where, under the Quebec Railway Act of 1880, the Privy Council held that an owner of land which is

account of damage caused to their properties by the mode of executing the work, whereby their access to a street was interfered with;

Held, reversing judgment of Court below, that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and the municipality was liable as a wrongdoer. *West v. The Corporation of the Village of Parkdale*, 12 S.C.R. 230.

In the Privy Council:

Held, that an order of the railway committee under sec. 4 of the Dominion Act, 46 Vic., cap. 24, does not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made, to take any person's land, or to interfere with any person's right.

Held, that such provisions of law include all the provisions contained in the Consolidated Railway Act, 1879, under the headings of "Plans and Surveys," and "Lands and their Valuation," which are applicable to the case; the taking of land and the interference with rights over land being placed on the same footing in that Act.

Where a railway company, acting under an order of the railway committee, did not deposit a plan or book of reference relating to the alterations required by such order.

Held, that it was not entitled to commence operations.

Held, further, that under the Act of 1879, the payment of compensation by the railway company is a condition precedent to its right of interfering with the possession of land or the rights of individuals.

(Distinguishing *Jones v. Stanstead Ry. Co.*, L. R., 4 P.C. 98) *Corp. of Parkdale v. West*, 12 App. Cas. 602.

(1) 12 L.N. 395; 14 App. Cas. 612.

Held, that a railway company, authorized by Parliament to construct its line along the bank of a navigable river, is not liable in damage to neighboring proprietors, whose access to the river has thus been cut off. *North Shore Ry. Co. v. Pion*, 4 Dorion Q. B. R. 358; 9 L. N. 218; 12 Q. L. R. 205, Q. B.

But Held, by Supreme Court (reversing), that a riparian proprietor and owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property; and that the railway company in the present case, not having complied with the provisions of 43-44 Vic., cap. 43, sec. 7, § 3 and 5, Que., the appellant's

injuriously affected by the construction of the railway is entitled to statutory compensation; and in default of the company proceeding, in the manner provided by the Act, to have the damage

remedy by action at law was admissible. *Pion v. North Shore Railway Co.*, 14 S.C.R. 677.

And Held, by the Privy Council, that the respondents, as riparian proprietors, had the same rights of *accès et sortie* as they would have had if the river had not been navigable; that the obstruction to such rights without parliamentary authority was an actionable wrong, but the substituted openings were no answer to a claim for indemnity; there is no distinction in principle between riparian rights on the banks of navigable or tidal rivers and on those non navigable. In the former case, however, there must be no interference with the public right of navigation, and in order to give rise to riparian rights the land must be in actual daily contact with the stream laterally or vertically. *Lyon v. Fishmongers Co.*, followed, 1 Appeal Cas. 662, and held applicable to every country in which the same general law of riparian rights prevails unless excluded by some positive general rule or binding authority of the *lex loci*.

Held, that under the Quebec Consolidation Railway Act, 1880, sec. 9, no authority is given to a railway company to exercise its powers in constructing its works, in such a manner as to inflict substantial damage upon land not taken without compensation.

Held, further, that as the appellants had not taken the necessary steps under the Act of 1880, to vest in them the power to exercise the right or do the things for which compensation would have been due under the Act, an action by the respondent would lie for damages, and the removal of the obstruction; in which if the obstruction were not ordered to be removed, damages as for a permanent injury to the land could be recovered. *North Shore Ry. Co. v. Pion, L.R.*, 14 App. Cas. 612.

Damage to rights of house owners, such as *droit d'accès* to streets, does not constitute expropriation and gives no right to preliminary indemnity. In France, the depreciation caused to a house by stopping one end of the street on which it fronts is not an interference with a servitude; nor standing alone such direct and immediate damage as will give title to indemnity; and *semble*, the law of the Province of Quebec is identical. Mayor of Montreal & Drummond, 22 L.C.J. 1, Q.B.; L.R., 1 App. Cas. 384; Ramsay's Digest 1004.

The lands in question were lots 3, 4 and 6 Clinton avenue, in the town of Niagara Falls. The defendants had taken, for the purposes of their railway, a small part of lot 3, and the plaintiff claimed damages for the injury caused to that lot and lots 4 and 6, by lowering the street in front of these lots, so as to enable the railway to be carried over the highway, and which was done in such a manner as to obstruct the plaintiff's access to his land.

Held, affirming the judgment of the Court below: 1. That upon the evidence the sum paid for the part of lot No. 3 actually taken included any damage to that lot but not to lots Nos. 4 and 6.

2. That the claim as to lots 4 and 6 was in respect of land injuriously affected by the exercise of the powers of the railway company within the meaning of the Con. Ry. Act, 1879, sec. 9, § 10 and 12 D.

Held, that under that Act or under the Con. Stat. of Can., cap. 66, as applied to these defendants by their special Act, compensation was recoverable.

Held, also, that there was nothing to exonerate the defendants in the fact that they had obtained leave from the municipality for doing as they

assessed, he may claim it by action. In both these cases it is to

had done, and that the Court could compel an arbitration to which the plaintiff was entitled under the Act. *Bowen v. Can. Southern Ry. Co.*, 14 O. A. R. 1.

To maintain an action of damages against a railway company, because of the running of the railway over a highway adjoining plaintiff's residence, and, as alleged, obstructing his ingress and egress, it is necessary for the plaintiff to prove that the immediate access to the premises was affected, and that he sustained damage particular to himself, and differing in kind from, and beyond that of, the rest of the public.

That the municipal authorities, having tolerated the laying and using of the railway as a public highway in the municipality, may be thereby estopped from urging that the use of the same was unauthorized by them. *Brodeur v. The Corporation of Roxton Falls and The S.E. Ry. Co.*, 11 R. L. 447 (1882).

Where appellant, the owner of several houses bordering on a street, through which a railway was authorized to pass both by statute and by resolution of the city council, sued the corporation for damages suffered on account of the construction and working of the railway; it was held that the appellant had no right of action against the corporation, for if the corporation gave the authorization in compliance with the statute, there was complete justification of the Acts complained of; the corporation, moreover, only gave the company liberty to choose one of the streets, and although the council were subsequently informed of the choice made, and asked to take steps to legalize the line, they took no further action.

The recourse of the appellant, if any be had, was not against the corporation but against the owners of the railway. *Lefebvre v. The City of Quebec*, Supreme Court, Cassel's Digest 177 (New Edit.).

Where the Legislature had granted a corporation leave to construct a bridge over a river in the Province of Quebec, it was held, that in order to recover damages for such construction it is necessary to prove that it obstructed the riparian proprietor's free ingress and egress to the river, and that in respect of obstruction to navigation, actual and special damage must be proved. *Bell v. Corporation of Quebec*, L. R., 5 App. Cas. 84, 7 Q. L. R. 103. Privy Council.

The privilege of erecting a toll bridge over a river does not confer any right of property in the waters of that river, which are part of the public domain.

The proprietor of such a bridge cannot demand the demolition of works erected upon a public river under authority of law, such as a bridge built by a railway company to cross passengers and carriages, even if used to convey them for gain or hire, contrary to a clause in his charter, his recourse being limited to the indemnity prescribed in his charter, and in default of payment thereof, a prohibition of all transport over the railway bridge will be granted. *Jones v. The Stanstead, etc., Ry. Co.*, 17 L. C. R. 81.

But Held, by the Judicial Committee of the Privy Council, that assuming the plaintiff, by virtue of his special Act, to be entitled to compensation, yet his action failed inasmuch as giving notice to treat for compensation was not a condition precedent to the company's right to exercise their powers, and therefore that the company were not wrongdoers. L. R., 4 P. C. App. 98.

Corporations in using the power conferred on them of expropriating are bound to use diligence, and consequently they are liable for the damages suffered by the expropriated proprietor by reason of unnecessary delays. *Judah v. The City of Montreal*, 2 R. C. 470, Q. B.

Held, affirming the judgment of Gwynne, J., 43 U. C. R. 522, that when a municipality raises a highway in such manner as to cut off ingress and egress to and from property abutting thereon, the owners of such property are entitled

be observed that the damage complained of was caused by the

to compensation under 36 Vic., c. 48, s. 373 (Ont.). *Yeomans v. The Corporation of Co. of Wellington*, 4 O. A. R. 301.

Trustees were possessed of a mill, 90 yards from an important thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare. A railway company by their special Act cut off entirely one access, substituting therefor a deviated road over a bridge with steep gradients, and the other access they diverted and made it less convenient. But none of the operations were carried on *ex adverso* the premises. The railway company's powers were contained in the 6th section of the Scotch Railway Clauses Act of 1845 (similar to the English Act), and which provided that "the railway company shall make to the owners and occupiers of and all other parties interested in, any lands taken, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken, and for all damages sustained by such owners, etc."

Held, affirming the decision of the Court below, that though an agreement entered into between the parties when the bill was before Parliament, whereby the trustees were induced to withdraw their opposition, provided their claim to compensation (should their lands be injuriously affected) should not be barred by reason of the company not taking any of that land, gave no right to compensation, the trustees were entitled to it under the Railways and Lands Clauses Con. (Scotland) Acts 1845. Per Lord Selbourne, L. C. The obstruction of access to a private property by a public road need not be *ex adverso*, but it must be proximate and not remote or indefinite to entitle the owner of that property to compensation for the loss of it—and it is a question whether a mere change of gradient alone would be a proper subject for compensation. *The Caledonian Railway Co. v. Walker's Trustees*, L. R., 7 A. C. 259.

A's predecessor in title obtained a feu contract from a superior, a building lot situate at the south side of an estate. The plan of the estate shewed it divided into feuing lots with streets running east and west, and one street 24 feet wide connecting the turnpike road on the north to another road on the south, and forming one side of A's feu. The lot was disposed "together with free ish and entry thereto by the streets laid down on the said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The reserved power was that "the superior should have full power and liberty to vary and alter said plan or streets or roads thereon, in so far as regards the ground not already fenced."

A railway company took a piece of land running from east to west through the estate, and in executing their works cut off all access for carriages by the street marked on the plan running from south to north 24 feet wide.

None of A's land was taken. A claimed compensation in respect that his lands were injuriously affected under sec. 6 of the Railway Clauses (Scotland) Act 1845.

Held, that A was not entitled to compensation, because: 1, the access in question had not been opened in the sense meant in his feu contract before the statutory notice; and 2, there was no obligation in the feu contract cast upon the superior to pursue his feuing scheme and give the feuers at some future time access along any of the roads or streets marked on the plan. Also, when there is an implied obligation by the feuer to prosecute his feuing scheme for the benefit of the feuers, they have a vested interest *de futuro* in the roads and streets shewn on the feuing plan sufficient to sustain a claim for compensation under the Railway Clauses Consolidation (Scotland) Act 1845. *Fleming & Wife v. The Newport Railway Co.*, L. R., 8 App. Cas. 265.

See *London, Brighton & South Coast Ry. Co. v. Truman*, L. R., 11 App. Cas. 45.

construction of the work. In the one case the owner's access to a street was cut off, in the other his access to a river.

In the instances cited, however, their Lordships were careful to confine the right to recover damages to those cases where lands were injuriously affected by the construction of the railway as distinct from its operation. That is to say, the lands, or some real right appertaining to the lands, must be affected by the actual construction of the work,—such, for instance, as by the making of a cutting or the construction of an embankment obstructing the proprietor's access and egress to and from his property; (1) or by the interruption of view, or the deprivation of light and air and access to a building. (2) But damages resulting from the operation of the road would not be admitted where no land is taken or used and no real right affected;—such as the inconvenience which an adjoining proprietor might suffer from the noise and smoke and vibration caused by the passing of trains. These are inconveniences which are necessarily consequent upon the exercise of the powers conferred upon the railway by Statute, and which individuals, upon whose lands or real rights the railway company does not encroach, must suffer in common with the general public, in a greater or less degree, as their property may be more or less distant from the railway. (3)

The provisions of the English Act are not so different from ours, but that the decision of the Courts there would have great weight in this country; (4) and several decisions have been given there which should be specially referred to in this connection.

In the case of *Brand v. The Hammersmith Ry. Co.*, (5) it was held by the House of Lords that a proprietor, no

(1) See cases cited in Note (1), p. 162.

(2) *Eagle v. Charing Cross Ry. Co.*, L. R., 2 C. P., p. 638.

(3) *Reg. v. Chester* (Stockport case), 33 L. J. Q. B. 251; *Rex v. Pease*, 4 B. & Ad. 30; *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679; *Brand v. Hammersmith Ry. Co.*, L. R., 4 H. L. 171; *Lon. & Brighton Ry. Co. v. Truman*, 11 A. C. 45; *MacWillie v. North Shore Ry. Co.*, M. L. R., 5 Q. B. per Cimon J., at p. 130; *Jones v. Stanstead Ry. Co.*, L. R., 4 P. C. App. 98; *Muir v. Caled. Ry. Co.*, 17 R. 48, ser. 1026; *Atty. Genl. v. Metropolitan Tramways Co.* (C. A. 1893), 9 R. 598.

(4) *N. S. Ry. Co. v. Lion*, 14 App. Cas. 612, supra p. 163; *Wood v. A. & N. W. Ry. Co.*, Q. R., 2 Q. B. at pp. 344 and 354; *Paradis v. The Queen*, 1 Exch. Rep. per Taschereau J., at p. 193; *Trimble v. Hill*, 5 App. Cas. 342; *City Bank v. Barrow*, 5 App. Cas. 664.

(5) L. R., 4 H. L. 171; supra, note 3.

part of whose land was taken for the purposes of the railway, could not recover statutory compensation for damage or annoyance arising from vibration, and the smoke and noise of passing trains, even though the value of his property had been actually depreciated thereby;—and that no statutory compensation having been provided for such damages, there was no right of action at common law to recover them. This principle, of course, would only be applied where there was no fault or negligence on the part of the company in the operation and construction of its railway. As has already been pointed out, where the company acts in the operation of its railway within the powers given to it by the Legislature, and without negligence, they are not liable for any loss or damage which they may occasion thereby to the general public, unless statutory compensation is expressly provided. (1) In the case of *Jones v. The Stanstead Railway*, (2) which was a railway constructed under 14 and 15 Vic., cap. 51 [containing a clause (sec. 4) corresponding to sec. 92 of the present Railway Act], the plaintiff claimed damages for loss of tolls on a bridge which he had constructed across the Richelieu River at St. Johns, P.Q., consequent upon the building of a bridge by the railway company a short distance from his own. There the Privy Council held that the damage sought to be recovered was too remote, not being "a necessary, patent, and obvious consequence of the construction of the work." But in the case of *Fion v. The North Shore Railway Company*, (3) already referred to, their Lordships said that the case of *Jones v. The Stanstead Ry. Co.* might well have been decided upon the same principle as *Brand v. The Hammersmith Ry. Co.*, viz., that this was a damage resulting to a proprietor, no part of whose land was taken, because of the use of the railway under the powers given to the company by Parliament. In the case of *The City of Glasgow Ry. Co. v. Hunter*, (4) where a part of a proprietor's land was taken by the railway, and another section of the road passed in rear of the same property, over a street or lane, the House of Lords held that anticipated damage from the

Principle

(1) *Supra* p. 166.

(2) 4 P. C. App. 125; 8 Moore N. S. 312.

(3) 14 App. Cas. 612.

(4) L. R., 2 S. C. App. 78.

noise and smoke of the trains passing over the section of the railway in rear of the property would not appear to be a proper subject of compensation under the Statute. But in a later case of the *Duke of Buccleuch v. The Metropolitan Board of Works*, (1) Lord (helmsford, who had sat also in the case of *The City of Glasgow Ry. Co. v. Hunter*, said that he saw no reason why compensation might not be given for actual deterioration in the value of property occasioned by the smoke, noise and vibration of passing trains, where a portion of the land so affected had been taken by the railway company; but this was not a case of the taking of land by a railway company, but of the taking of land for the construction of the Thames embankment, and a highway thereon, by the Metropolitan Board of Works; and his Lordship was not quite accurate in stating that in both the cases of *Brand v. The Hammersmith Ry. Co.* and *The City of Glasgow Ry. Co. v. Hunter*, no portion of the proprietor's land had been taken; for in the latter case, according to the report, there was certainly a portion of the land taken by the railway company, though the damage complained of was not caused by the operation of the railway upon the part taken, but upon a section of the same road passing in rear of the property. However, in the case of *Essex v. The Local Board of Acton*, (2) the House of Lords, in 1889, definitively and finally decided that where part of land is taken, the proprietor is entitled to compensation for depreciation of the remaining land, caused by the use to which the land taken is put; although proprietors of adjoining lands, of which no portion is taken, cannot recover. Though this was not the case of a railway, and though a distinction may be drawn between a railway and other works permitted by legislative authority, (3)

(1) L. R., 5 H. L. 418.

(2) 14 App. C. 153.

(3) "The Railway Acts, treated as a well-known and recognized class of legislation, were expressly and carefully distinguished from the permissive character of the legislation which your Lordships were then construing (referring to *Metropolitan District Asylum v. Hill*, 6 App. Cas. 193). Broadly stated, the distinction taken amounted to this, that a smallpox hospital might be built and maintained if it could be done without creating a nuisance, whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not." Per Lord Halsbury, L. C., in *Lon. & Brighton Ry. Co. v. Truman*, 11 App. Cas. at p. 53; and see *Shelfer v. City of London Electric Light Co.*, 12 R. 96.

we may take it that it is now practically settled law, that a proprietor, a portion of whose land is taken by the railway, is entitled to compensation for actual deterioration in value of the remainder of the property caused by the operation of the railway. (1) This has now been decided by the Quebec Court of appeals in *Wood v. A. & N. W. Ry. Co.* (2)

In that case, after a careful review of the jurisprudence in England, it was held that it is now the settled jurisprudence of the English courts that in cases where a portion of the proprietor's land has actually been taken for railway purposes, so as to compel or authorize the adoption of the statutory provisions for determination of the amount of compensation, the jury are authorized to take into consideration an estimation of damages or depreciation resulting from the use of the railway as distinguished from its construction. And Hall J., in rendering the judgment of the Court, after pointing out that the principles laid down by both the old and modern French authors are in the same sense, but that in France they have no general Railway Act corresponding with ours, and their method of determining compensation before the "Conseils de Préfecture" differs so much from our own that no precise authorities can be cited from that jurisprudence, said that a comparison of the English and Canadian Acts would show no intended diminution or curtailment of the liability of the railway company toward the land owner under the Canadian Act as compared with the English one; and that in his opinion that liability is if anything enlarged under section 89 of our Act, which says, that for all damages caused by the Act in the exercise of the powers conferred upon them, they shall make full compensation, in the manner herein provided. (3) The learned judge went on say that whatever may be the liability of a railway company for damages to an adjoining proprietor, none of whose land has been taken, there can be no doubt that where land or real rights have been actually expropriated the company is bound to compensate the proprietor, not only for the land actually taken but for the direct damage to his remaining

(1) See *Lon, Tilbury & South End Ry. Co. v. Gower's Walks Schools*, L. R., 24 Q. B. 326.

(2) *Que. R.*, 2 Q. B. 335.

(3) *Que. R.*, 2 Q. B., at pp. 352-354.

land, resulting either from construction and severance, or from the use of the railway line and the operation of the traffic service; and the learned judge went on to say: "This is but the adoption of the general principle that no one can use his own property or rights to the detriment of his neighbor, even if the exercise of his right be under the authority of an Act of Parliament." (1) This last proposition is directly contrary to the principles laid down by the English courts in the cases already referred to, and now firmly established by the very recent cases of *The London v. Brighton Ry. Co. v. Truman*, (2) and *The Attorney General v. London Tramways Co.*, (3) to which reference has already been made. That is to say, if the learned judge meant by this proposition that a railway company, in the proper exercise of its statutory powers, could not, without being liable in damages, use its property or rights to the detriment of a neighboring proprietor, none of whose land or real rights had been expropriated by the railway company. The principle seems to be too firmly established in England to admit of doubt, that where the railway company does not expropriate or make use of the land of an adjoining proprietor, and does not interfere with any real right appertaining to such property, the proprietor cannot recover compensation, either under the statutes or the common law, for damages caused by the use or operation of the railway, on the plain ground that what the legislature has declared to be a right the courts cannot hold to be a wrong. (4)

1) Q. R., 2 Q. B. at p. 355. (2) 11 App. Cas. 53.

(3) (Court of Appeals 1893.) 9 R. 598.

(4) Per Blackburn J. in *Hammersmith Ry. Co. v. Brand*, L. R., 4 H. L. at p. 197; and see *Shelfer v. City of London Electric Light Co.*, 12 R., per Lord Halsbury, at p. 108; and cases cited in note (3), p. 166.

The Railway Clauses Consolidation Act and the Land Clauses Act do not contain any provisions under which a person whose land has not been taken for the purposes of a railway can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains after the railway is brought into use, even though the value of the property has been actually depreciated thereby.

The right of action for such damages is taken away. *Hammersmith, etc. Ry. v. Brand*, L. R., 4 H. L. 171.

Though compensation may not be granted to a person annoyed by the smoke and vibration occasioned by trains passing along a railway constructed under the authority of an Act of Parliament where no part of his land had been taken, compensation may be given for deterioration in the value

A careful examination of the various sections of our Railway Act would lead one to the conclusion that no compensation is intended to be given, for damages caused by the operation of the railway, to the proprietor of a neighboring property, where no part of such property has been expropriated or interfered with; but that such compensation would be due to a proprietor, even though no part of his land was taken from him, if the company made any use of any part of his land or interfered with any real right appertaining thereto, such, for instance, as a right of way or passage. (1)

As already pointed out, section 92 provides that the company shall make compensation in the manner provided by the general and the special Act to all parties interested for all damage sustained by reason of the exercise of their powers; but the only manner provided for making such compensation is that con-

occasioned in a similar manner, where a part of his land has been taken for the construction of a work authorized by an Act.

In this question of compensation may be considered his particular and individual use of that in which he had no proprietary right, such as the shore of a tidal river, and where B was riparian proprietor, having a right to the undisturbed flow of the river along the whole frontage of his property, he was entitled to damages for being deprived of that right. *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 H. L. 418.

Where several pieces of ground owned by the same person are, though not adjoining, so near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Lands Clauses Consolidation Act 1845, §§ 49 to 63, so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest, the owner has a right to compensation for the depreciation. *Cowper Essex v. The Local Board for Acton*, L. R., 14 App. Cas. 153.

No claim can be made in respect of a damage for which the claimant would not have had an action supposing the Railway Act had never been passed. The damage must be done by the construction of the works, and not afterwards when the works have been completed.

Held (reversing), that statutory compensation cannot be claimed by reason of the noise and smoke of trains, whether part of the claimant's land be taken or not, anticipated damage from the noise and smoke of trains does not appear to be a proper subject of estimate of compensation under the Railway Statutes.

The Legislature having given the promoters no power to annoy the occupiers of neighboring property with smoke, an injury from this cause is not the subject of compensation but a ground of action. A man may have a right of action and a right of indictment where he cannot claim statutory compensation. *City of Glasgow Union Ry. Co. v. Hunter*, L. R., 2 Sc. App. 78.

(1) *Wood v. A. & N. W. Ry. Co.*, Q. R., 2 Q. B. 335.

tained in sections 136 to 172 inclusive, which sections are contained in that portion of the Act headed "Lands and their Valuation."

Section 144 provides for making compensation by agreement, with the owners of the lands, which may suffer damage from the taking of materials or the exercise of any of the powers granted for the railway. But these lands, as has already been pointed out, are to be shown upon the location plan and book of reference of the railway. Certainly it would not appear that the company are bound to show on such plan any land which they did not intend to take or use or interfere with in some way in the construction of the road. Then the provisions with regard to compulsory expropriation require that the party to be expropriated shall be served with a notice containing a description of the lands to be taken, or "of the powers intended to be exercised with regard to any lands, and describing the lands;" (1) and the compensation which the arbitrators are authorized to grant is for the taking of the lands, or the damages caused by the exercise of the company's powers with regard to the lands, as described in this notice. As was said by Lord Chelmsford, in *Hammer Smith Ry. Co. v. Brand*: (2) "To say that the use of the railway after its construction is one of the powers vested in the company in regard to the lands, conveys to my mind no intelligible meaning."

It can hardly be contended that the railway company could be compelled to give notice to a proprietor of land, which was not in any way touched or interfered with by the construction of the railway, that they intended to exercise with regard to such land the power of running and operating their railway in its vicinity, and that they were willing to pay a certain sum as compensation for the damage which might be caused to his land by the operation of the road, such, for instance, as those caused by the smoke and noise of passing trains.

It would be impossible, in the first place, to accurately determine at what distance from the railway lands would be injuriously affected by such causes, and, in the second place, to estimate the extent of the injury and the amount of compensation which should be given in any particular case.

1) Sec. 136.

(2) L. R., 4. H. L. 171.

The public generally, having property within sight, and hearing of a railway, must suffer inconvenience, more or less in degree but the same in kind, as they may happen to be more or less distant from the railway, caused by the smoke and noise of passing trains. But there does not seem to be provided by the Act any manner in which such persons should be compensated. And section 153 would seem to point in the same direction, inasmuch as it refers only to such inconvenience, loss or damage as might be sustained by reason of a company taking possession of or using lands.

A reference to section 101 would also seem to confirm this view. There provision is made for compensation in the case of the taking of Indian lands injuriously affected by the construction of the railway, the language of the section being as follows: "When any portion of such lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in other cases."

It does not seem reasonable to suppose that the legislature intended to make a distinction, as to the compensation to be given, between the case of Indian lands injuriously affected by the railway and any other lands. And as it is provided by that section that in the case of Indian lands compensation shall only be made for lands taken and lands injuriously affected by the "construction" of the railway, and that such compensation should be made therefor "as in other cases," it would seem a fair inference that in other cases compensation was intended to be given only where the lands were injuriously affected by the construction of the railway, as distinguished from its operation, that is, where no land is actually taken; unless it can be shown that special provision is made in other cases for lands injuriously affected by the operation of the railway, and such would not seem to be the case.

31. As to what kind of damage it is within the powers of the arbitrators to allow in assessing the compensation apart from the value of the land taken, it may be said that as a general rule they may take into consideration any direct, tangible and appreciable injury or damage, particularly affecting the property in question

Nature of damages that may be considered by arbitrators.

which can reasonably be foreseen. (1) As instances, might be mentioned, the injury caused to a farm, or such like property, by the severance of one portion from another, as where a railway crosses a farm property, separating the farm buildings from the house or from some other part of the farm, increasing the difficulties of access from one portion of the farm to another; and the inconvenience caused by the necessity of crossing the railway with carts, horses and cattle; and the trouble and loss of time in having to open and close the gates on each occasion. Again, the manner in which a railway crosses a particular property may cause loss, as, for instance, if it cuts through the property in a diagonal line, instead of at right angles, thus cutting up fields or lots, and rendering them unavailable or less available for the purposes for which they were intended.

The danger arising from sudden emerging of trains from a snowshed without warning, having the effect of frightening horses, etc., is a subject of compensation. (2) Also damage resulting from an increased risk of fire. (3) So held, where the plaintiffs were owners of a waterside property, upon which they operated two marine railways. A portion of this property was expropriated for the right of way of a Government railway, the latter being situated in such close proximity to the plaintiff's works, that the works, as well as ships in course of repair upon them, would be in danger of taking fire from locomotives when the Government railway was put in operation. In consequence of this increased risk from fire, it was shewn that plaintiffs would have to pay higher rates of insurance upon their works than they had hitherto paid, and that ships might be deterred from using the marine railway. For these causes it was held compensation was properly allowed. (4) But the possible damage to bush land from greater exposure to winds and storms, and the greater liability to injury by fire, by reason of the working of the railway,

(1) *Wood v. A. & N. W. Ry. Co.*, Q. R., 2 Q. B. 335; *Lawrence v. G. N. W. Ry. Co.*, 16 Q. B. 643; and see *Great Laxey Mining Co. v. Clagis*, 4 App. Cas. 115.

(2) *Vezina v. The Queen*, 2 Exch. 11. Confirmed in Supreme Court, 17 S. C. R. 1.

(3) *Straits of Canseau Marine Ry. Co. v. The Queen*, 2 Ex. 113; and see *Stockport case*, 33 L. J. Q. B. 251.

(4) *Straits of Canseau Marine Ry. Co. v. The Queen*, 2 Ex. 113.

are contingencies too remote to be considered in estimating the amount of compensation where there are no buildings to be endangered. (1) And danger to persons and animals should not be included. (2)

In assessing damages, regard should be had to the prospective capabilities of the property arising from its situation and character. (3) But while the remote probability that land would become available for building purposes upon the extension of the limits of an adjoining town may add something to the value which the property would otherwise have had, compensation should not be based upon any supposed value of the land for building purposes at the time of the expropriation. (4) But held in England, that where agricultural land, which might have become valuable for building, is severed, so as to be useless for building, this depreciation may be taken into consideration. (5) Where lands possess a certain value for building purposes at the time of the expropriation, but that value cannot be ascertained from the actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value. (6)

32. The value of the land to be estimated is the value it has in the hands of the owner, subject to such restrictions as there may exist upon its use, and not the value it will have in the hands of the company freed from all restrictions. (7) And this value must be the value at the time of the expropriation. (8) Where claimant sought to recover damages in respect of a portion of his farm as a gravel pit, but failed to show that it had a value *quoad*

Value of
land, how
estimated.

(1) *In re Arbitration between Ont. & Que. Ry. Co. and Gen. Taylor*, 6 O. R. 338.

(2) *Re Scott v. Railway Commrs.*, 6 Man. 194; *A. & N. W. Ry. Co. v. Descarie*, 21 R. L. 194.

(3) *Paint v. The Queen*, 2 Ex. R. 149. Confirmed by Supreme Court, 18 S. C. R. 718; but see *Re Nicholson v. Ry. Commrs.*, 7 Man. 400.

(4) *Kearney v. The Queen*, 2 Ex. 21. Supreme Court, 30th April, 1889. *Cassels Dig.* 313.

(5) *Reg. v. Brown*, L. R., 2 Q. B. 630.

(6) *Falconer v. The Queen*, 2 Ex. R. 82.

(7) *Stibbing v. Metropolitan Ry. Co.*, L. R., 6 Q. B. 37; *Paint v. The Queen*, 2 Ex. R. 149.

(8) *Vezina v. The Queen*, 2 Ex. R. 11; and see sec. 145 Ry. Act.

hoc at the time of the taking, the Court declined to assess its value otherwise than as farm land. (1)

Where certain land remaining to the owner was not appreciably affected in respect of the value it had to him for the purposes of occupation, the damages were ascertained and assessed in respect of its depreciation in market value. (2)

Although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which in consequence of the expropriation he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purposes of his business; and in that case should be indemnified for any depreciation in its value to him for the purposes for which he has been accustomed, and still desires, to use it. (3) The nature of the title to the land is also a criterion of its value. (4)

Where the claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in his pleadings, the Court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses. (5)

Where a wharf in course of construction, and materials to be used in completing it, had been taken by the Crown, the Court allowed the claimants a sum representing the value of the wharf as it stood, together with that of the materials; and to this amount added a reasonable sum for the superintendence of the work by the builder, who was one of the claimants, for the use of the money advanced, and for the risks incurred by him during the construction thereof,—in other words, a sum to cover a fair profit to the builder on the works so far as completed. (6)

In assessing damages where land has been expropriated, the unity of the estate must be considered; and if by the severance of one of several lots, so situated that the possession and control of each give an enhanced value to them all, the remainder is

(1) *Ibid.*

(2) *Ibid.*

(3) *Reg. v. Carrier*, 2 Ex. R. 36.

(4) *Ibid.*

(5) *Falconer v. The Queen*, 2 Ex. R. 82; and see *Cardinal v. La Cie. de Ch. de Fer de Beauharnois*, 20 R. L. 648.

(6) *Samson v. The Queen*, 2 Ex. R. 94.

depreciated in value, such depreciation is a substantive ground for compensation. (1)

It was said by Taschereau J. in *Paradis v. The Queen*, (2) that it is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him that should be the basis of compensation. Also, that the valuation of a property appearing upon the municipal assessment roll does not constitute a test of the actual value upon which compensation should be based, where such valuation is made arbitrarily and without consideration of the trade carried on upon the property or the profits derivable therefrom.

In a case of expropriation, the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. (3) Where, however, such tests or experiments have not been resorted to, the Court or jury must find the facts as best it can from the indications and probabilities as disclosed by the evidence. (4)

(1) *Paint v. The Queen*, 2 Ex. R. 149.

(2) 1 Ex. R. 191.

(3) *Brown v. The Commissioners for Railways*, 15 App. Cas. 240.

(4) *Regina v. McCurdy*, 2 Ex. R. 211. "No company shall, without the authority of the Railway Committee, locate the line of its proposed railway, or any branch thereof, so as to obstruct or interfere with or injuriously affect the working of, or the access or adit to, any mine then open or for opening which preparations are, at the time of such location, being lawfully and openly made." Sec. 119.

The "mines of coal, ironstone and other minerals," which sec. 77 of the Railway Clauses Act 1845 except out of the conveyance of the railway company, and the "mines and minerals" under the railway, or within the specified distance which sec. 78 empowers the owner to give notice of his intention to work, include not only beds and seams of minerals got by underground working, but also such as can only be worked and according to the custom of the district would be properly worked by open or surface operations.

So Held, by Lords Herschell and Watson (Lord MacNaughton dissenting, and retaining the opinion expressed in *Lord Provost of Glasgow v. Farie*, 13 App. Cas. 657). *M. & L. Ry. Co. et al. v. Rev. Sir F. L. Robinson*, 15 App. Cas. 19.

That to justify an owner giving such a notice, it is not necessary that he should intend to work the minerals himself, but there must be a real and bona fide desire to work either by himself or by his lessees or licensees. *Ibid.*

Limestone is a mineral within the meaning of the above sections. *Ibid.*

This case raised a question concerning land taken—with portions of mineral under it—by the railway company as to the owner's right to compensation in respect of his inability to get the coal under or near the railway. Lord Gerard was the owner of land near Wigan—having coal and other minerals under it through which the railway ran. The company gave notice to take not only

Finally, in assessing the value of lands taken or injuriously affected by a public work, the owner should be allowed a liberal not a bare indemnity.

Access to
landways and
waterways.

33. The owner of land fronting upon a highway, whether it is a landway or a waterway, has a right of access to the highway, and is entitled to compensation if his access is cut off. (1) So a person whose land abuts on the foreshore is entitled to com-

surface land but also the minerals under it, except seams of coal which ran under parts of the land, and were not then worked. Lord Gerard claimed under these notices to be entitled to receive present compensation in consequence of being bound in law to leave unworked large quantities of coal, either subjacent or adjacent, in order to afford necessary support to the other strata, and because it was impossible to work it without taking away part of the land and minerals sold to the company. The effect of this claim would have been to make the company pay at once, not only the price of the land taken, but also for all the subjacent and adjacent coal, and the ground of the claim was that the company were not only taking the land, but also the minerals under it. It was contended on behalf of Lord Gerard that the railway running through the land, and the company having taken not only the land under the railway, but the minerals under the land (except the coal), the owner was unable to work his coal on either side up to or near the railway, because so working would interfere with the minerals under the railway. The matter had gone to arbitration under the Lands Clauses Act 1845, and evidence had been received by the arbitrator to support the claims thus set up by Lord Gerard. The company had thereupon obtained a rule *nisi*, allowing them to revoke their submission, on the ground that these claims were not maintainable, and that though, if Lord Gerard sustained any injury or increased expense in working his coal in consequence of the railway, he might set up a future claim for compensation, there was no ground for entertaining the claims now to enhance the price to be paid for the land and minerals. The court thought the contention of Lord Gerard was not well founded, and that his rights were governed by section 77 and the following sections in the Railway Clauses Act 1845. Those sections applied not only to cases where no mines or minerals were taken, but in every case in which mines or minerals were taken, and they were applicable to a case where a company had purchased with the land certain subjacent minerals, but had left others to the land owner. There was nothing in the Act to confine it to cases of the purchase of surface land only. The claims not being, therefore, maintainable, and the evidence offered not being admissible, the rule giving the railway company leave to revoke the submission would be made absolute with costs, the company undertaking not to revoke unless the arbitrator continued to receive the evidence objected to. Lord Gerard *v.* The London & North Western Railway Co., Times Law Rep., Vol. X, p. 657; confirmed in appeal, *ibid.* Vol. XI, p. 170.

(1) *Lyon v. Fishmongers Co.*, 1 App. Cas. 662; *Chamberlain v. West End of London & Crystal Palace Ry. Co.*, 31 L. J. Q. B. 201, 32 L. J. Q. B. 173; *Caledonian Ry. Co. v. Walker's Trustees*, 7 App. Cas. 259; *Duke of Buccleugh v. Met. Board of Works*, 5 H. L. 418; *Pion v. North Shore Ry. Co.*, 14 App. Cas. 612; *Corp. of Parkdale v. West*, 12 App. Cas. 602.

pensation if his access to the sea or a navigable river is cut off. (1)

And in the same way the right to compensation arises, if by lowering or raising the highway the access is impeded, or additional fences or earthworks become necessary; (2) also the construction of a railway along the sidewalk contiguous to lands whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held. (3)

Where the right, in respect of which the owner claims compensation, is a public right, common to himself and the public generally, the following rule may be laid down to determine the right to compensation. Where the right is entirely taken away, or so interfered with as to reduce or depreciate the market value of the property apart from the uses to which any particular owner may put the property, there is a right to compensation. (4)

Thus, for instance, if the access to a house is cut off by the blocking up of a road giving access to the house, this is a clear injury to the house as a property. (5) So where a house fronting on a highway is depreciated in value by the narrowing of the road, a right to compensation arises. (6)

But where, by the construction of the railway, the use of a street as a highway is merely rendered less convenient, with consequent personal inconvenience, or damage to trade, of persons living on the street, the owner or occupants of property abutting on the street are not entitled to compensation; on the ground that the

(1) A riparian proprietor on a navigable river is entitled to damages against a railway company, for any obstruction to his rights of *accès et sortie*; and such obstruction without Parliamentary authority is an actionable wrong. *Pion v. N. S. Ry. Co.*, 14 App. Cas. 612 followed; *Bigaouette v. North Shore Ry. Co.*, 17 S. C. R. 363; and see *Bowen v. Can. Southern Ry. Co.*, 14 O. A. R. 1.

(2) *Regina v. St. Luke's, L. R.*, 7 Q. B. 148; *Moore v. Great S. & W. Ry. Co.*, 10 Ir. C. L. 46; *Twohey v. G. S. & W. Ry. Co.*, 10 Ir. C. L. 98; *Reg. v. Eastern Counties Ry. Co.*, 2 Q. B. 347.

(3) *Reg. v. Barry*, 2 Ex. 333; *Reg. v. Malcolm*, 2 Ex. 357.

(4) *Metropolitan Board of Works v. McCarthy, L. R.*, 7 H. L. 243; *Wadham v. N. E. Ry. Co.* { 14 Q. B. D. 716;
16 ib. 257.

(5) *Caledonian Ry. Co. v. Walker's Trustees*, 7 App. Cas. 259.

(6) *Beckett v. Midland Ry. Co., L. R.*, 3 C. P. 82; *Metropolitan Board of Works v. McCarthy, L. R.*, 7 H. L. 243; *Wood v. Stourbridge Ry. Co.*, 16 C. B., N. S., 222.

inconvenience is one which they suffer in common with, though to a greater degree than, the public generally. (1)

A temporary obstruction of a highway, for the purpose of a public work, does not entitle the owner of property on the highway to compensation. (2)

Quebec law
and English
law on the
subject
compared.

34. The law of Quebec allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Such are the rights *d'accès et de sortie des rues ou d'égouts*.

(1) *Brodeur v. Corp. of Roxton Falls*, 11 R. L. 447.

R. was occupier of a public house situated by the side of a public footway. A company obtained powers under certain Acts of Parliament (with which the provisions of the Lands Clauses Acts and Railway Clauses Acts were declared to be incorporated) to make a railway.

The company obstructed streets leading to this foot-way so as to make the access to the public house inconvenient. The obstructions were not permanent, and after some time the streets were restored to their original condition.

It was found by the jury that there were no structural damages to the premises, but that R. had sustained damage in respect of the interruption of his business.

Held (diss. Lord Westbury), that R. was not entitled under the 68th section of the Lands Clauses Act, nor the 6th or the 16th Sections of the Railway Clauses Act, to receive compensation for injury to his trade consequent upon these obstructions.

Ricket v. The Metropolitan Ry. Co., L. R., 2 H. L. 175.

Per Lord Westbury:—"At p. 203. "I entirely concur with the doctrine that compensation cannot be claimed by an individual for damage which is sustained in common by all the subjects of the realm. Thus, if a public highway be diverted, or crossed on the level, by a railway, the inconveniences of having to wait whilst trains pass is common to all the public; and the benefit which it is considered results to the public from the railway is the only compensation. Persons dwelling in the neighborhood may sustain this inconvenience more frequently than the rest of the public; but if the inconvenience is to be regarded as compensated by the public convenience, it cannot be converted into a ground of compensation by reason of certain persons having to sustain the inconvenience more frequently than the rest of their fellow-subjects."

In order to found a claim to compensation under the 68th section of the Lands Clauses Consolidation Act 1845, for an interest in land, "injuriously affected," there must be an injury and damage not temporary but permanent, peculiarly affecting the house or land itself in which the person claiming compensation has an interest. A mere personal inconvenience, obstruction or damage to a man's trade or the good will of his business will not be sufficient, although any one of them might, but for Act of Parliament which authorizes the doing of the thing which causes the injury, have been the subject of an action against the person occasioning it. *Chamberlain v. The West of London Ry. Co.* (2 B. & S. 605-617), and *Beckett v. The Midland Ry. Co.* (L. R., 3 C. P. 82), approved. *Ricket v. The Metropolitan Ry. Co.* (L. R., 2 H. L. 175), explained and affirmed. *Metropolitan Board of Works v. McCarthy*, L. R., 7 H. L. 243; and see *Sanche v. C. P. R. Co.* 16 R. L. 296.

(2) *Herring v. Metropolitan Board of Works*, 34 L. J. M. C. 224.

There is a clear distinction in the law of Quebec between rights of immediate access from a man's property to a highway, and the power to complain of a mere obstruction in it. The French law recognizes "*droit d'accès et de sortie*" as rights belonging to a house in a street. It is evident that this right of access is different from the right of passage which the owner has in common with the public.

The right of access to a house is of course essential to its enjoyment; and if by reason of alterations in the street the owner cannot get into or out of it, or is seriously obstructed in doing so, he can recover indemnity for the damage he sustains. (1) But the stopping of a street at one of its ends only does not produce these consequences. (2)

In Quebec also, a distinction is made between direct damage, which gives the sufferer a right to compensation, and indirect damage which does not. (3)

There may be *droit d'accès et de sortie* to and from a river or stream belonging to riparian land, which, if interfered with, would at once give the proprietor a right of action. But this right appears to be confined to what it is expressed to be, the power of getting from the waterway to and upon the land (and the converse) in a free and uninterrupted manner. When this right of access is not interfered with, although the navigation of the river be somewhat obstructed, the riparian proprietor is not entitled to compensation, unless actual and special damages peculiar to himself, and different in kind from those suffered by the public generally, are proved. (4)

A distinction is thus drawn between the right of access from the river to a riparian frontage, and the right of navigation when upon it. When this access is not interrupted, and the waterway of the river is open to the riparian land, the question arises whether the right of action of the riparian proprietor, for a distant obstruction in the river, can be based on higher or other ground than would be that of any one of the public using the river and

(1) *Morrison v. Mayor of Montreal*, 4 L. N. 25 (Q. B. Que. 1880).

(2) *Mayor of Montreal v. Drummond*, 1 App. Cas. 406.

(3) *Ibid.*

(4) *Bell v. Corp'n. of the City of Quebec*, 5 App. Cas. 97-98; and *vide Bro-deur v. Corp'n. of Roxton Falls*, 11 R. L. 447.

sustaining special damage. The right of access to the waterway from riparian land is a private right which the owner of such land enjoys *qua* owner; this right is analogous to the *droit d'accès et de sortie* recognized by the law of Quebec. If the English law attributes larger rights than these to riparian proprietors on navigable rivers, it goes further in this direction than the law of Quebec. But it would not seem to.

Thus, where the construction of a bridge does not interfere with the riparian proprietor's right of access to the river, it has been held that the latter has no right to compensation, excepting he can prove actual and special damages peculiar to himself and not suffered by him in common with the rest of the public, and that the Quebec and the English law in this respect is the same. (1) Whether an obstruction amounts to an interference with a riparian proprietor's access to his frontage, which is a private right by English as by Quebec law, is a question of fact to be determined by the circumstances of each particular case. (2)

According to Quebec law, the beds of navigable and floatable rivers are the property of the Crown. (3) The test as to whether a river is navigable or floatable is its possible use for transport in some practical and profitable manner, (4) which would in Quebec include the floating of logs and timber.

When the right of navigation on a river is connected with an exclusive access to and from a particular wharf, it assumes a different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. (5) It was held in *Miner v. Gilmour* (6) that the rights of riparian proprietors in non-navigable and non-tidal water-course are the same under the English as under the Lower Canada law; and that by the general law applicable to running streams, every riparian proprietor has a

(1) *Bell v. Corp'n. of the City of Quebec*, 5 App. Cas. 85.

(2) *Ibid.* 85. (3) C. C. Art. 400.

(4) *Bell v. Corp'n. of Quebec*, 5 App. Cas. 85.

(5) *The N. S. Ry. Co. v. Pion*, 14 App. Cas. 619.

(6) 12 Moore, P.C., 131 (1858).

right to what may be called the ordinary use of the water flowing past his land,—for instance, to the reasonable use of the water for his domestic purposes, and for his cattle. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not interfere thereby with the rights of other proprietors either above or below him. This general principle is, in England, applicable to navigable and tidal rivers saving the right of the public to unobstructed navigation. (1)

The only ground of distinction between a non-navigable river and a navigable or tidal river, forming at high water the boundary of riparian land, is that in the case of a non-navigable river the riparian owner is proprietor of the bed of a river *ad medium filum aquæ*, whereas, in the case of a navigable river, it belongs to the Crown. The right of a riparian owner to the use of a stream does not depend on the use of the soil of the stream.

The right to the enjoyment of a natural stream of water on the surface belongs, *ex jure naturæ*, to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality; and to go from him without obstruction upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. (2)

It is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream, but it is sufficient that this contact should exist daily, in the ordinary and regular course of nature, though it may not continue during the whole of any day. (3)

Such land should not be valued as if it had no river frontage, or as if the owner had no riparian rights.

The construction of its road by a railway company upon the foreshore of a navigable and tidal river, thereby obstructing by means of an embankment extending along the entire length of plaintiff's land his access to the water, gives him a right of action,

(1) *Lyon v. Fishmongers Co.*, 1 App. Cas. 683.

(2) *Chassmore v. Richards*, 7 H. L. Cas. 349.

(3) *Ibid.*, and *Miner v. Gilmour*, 12 Moore, P.C., 131.

even though the company leaves one opening in the embankment and another opening just outside the plaintiff's property. (1)

Loss of
business.

35. The owner of land is entitled to put it to what uses he pleases; no right of compensation therefore arises if a railway company, having purchased land, pulls down the houses upon it, and thereby destroys the custom of a neighboring shop. (2)

The owner of a house may pull it down and rebuild it, or rebuild the common walls, if he is careful to do no avoidable injury to the adjoining house, and the adjoining owner has no claim to compensation for noise, discomfort, loss of trade, etc., provided the work be done with care and skill and according to the rules of art. (3)

Injury to
business.

36. If injury is caused by the railway not to the property as such but merely to the property as used for a particular purpose, such as a business, or, in other words, to the business carried on upon the property, no compensation can be recovered. (4)

Loss of
privacy.

37. A landowner has no right of action because buildings on neighboring lands overlook his land, and thereby interfere with its privacy; (5) provided that they are built at such distance from his land as the law or custom of the locality requires. (6)

Injury to
franchises,
ferries.

38. It is clear that an actionable injury to an incorporeal hereditament, such as a franchise, is a subject matter of compensation. Thus the obstruction of access to a ferry appurtenant to the claimant's house is matter for compensation. (7) A ferry is the exclusive right of taking passengers across a stream by means of boats. It is no infringement of a ferry to

(1) *North Shore Ry. v. Pion*, 14 App. Cas. 612; *Bigaouette v. North Shore Ry. Co.*, 17 S. C. R. 363.

(2) *Regina v. London Dock Co.*, 5 A. & E. 153; *Regina v. Vaughan, L. R.*, 4 Q. B. 190; *Paradis v. The Queen*, 1 Ex. R. 191.

(3) *Regina v. Hungerford Market*, 1 A. & E. 668, 676; *Peck v. Harris*, 12 L. C. R. 355; *Lyman v. Peck*, 12 L. C. R. 368; *Moynagh v. Angus, Q. R. S. C.* not yet reported.

(4) *Rex v. Lon. Dock Co.*, 5 A. & E. 165; *Rickett v. Metropolitan Ry. Co.*, L. R., 2 H. L. 175; *Herring v. Metropolitan Board of Works*, 34 L. J. M. C. 224; *Wadham v. N. E. Ry. Co.*, 14 Q. B. D. 747.

(5) *Re Penny*, 7 E. & B. 660; *Sirey (V.)* 80, 2, 308.

(6) C. C. 534-538.

(7) *Regina v. G. N. W. Ry. Co.*, 14 Q. B. 25.

provide fresh means of passage for a new kind of traffic. Thus a railway bridge, though in the line of a ferry, inasmuch as it does not connect the highways connected by the ferry, but provides means of transit for the traffic brought along the railway, is no infringement of the ferry. And if the use of the railway bridge is allowed to foot passengers free of toll, to enable them to get to and from the station of the company, the case is within the same principle. (1)

39. Any interference with an easement or servitude appurtenant to land entitles the owner to compensation. This has been decided with reference to a private right of way and to an easement of light (2) and to a subway. (3) And such interference would seem to open the door to compensation for all damages to the land to which the servitude or easement is attached, it being looked upon as being an expropriation of a real right. (4)

40. In addition to the grounds of damage already specified, the arbitrators have the right to take into consideration the value of trees upon the property taken or those which may be damaged by the exercise of the powers of the company. Fruit trees, or trees valuable for other reasons, may be valued, and their value taken into consideration by the arbitrators as an element in arriving at the compensation to be paid to the proprietor. It has so been held by the Courts of the Province of Quebec in several cases arising under the Railway Acts, (5) but it may be strongly doubted whether the arbitrators have the right to give the value of the trees, in addition to the full value of the land, for in most cases the full value of the land would include the trees growing upon it. For instance, applying the

(1) *Hopkins v. G. N. W. Ry. Co.*, L. R., 2 Q. B. D. 224, overruling *Reg. v. Cambrian Ry. Co.*, L. R., 6 Q. B. 422; and see *Jones v. Stanstead Ry. Co.*, 4 P. C. App. p. 68.

(2) *Glover v. North Staffordshire Ry. Co.*, 16 Q. B. 912; *Eagle v. Charing Cross Ry. Co.*, L. R., 2 C. P. 638; *Clarke v. London School Board*, 9 Ch. 120; *Ford v. Metropolitan Ry. Co.*, 17 Q. B. D. 12; *Regina v. Poulter*, 56 L. J. Q. B. 581; *Wood v. A. & N. W. Ry. Co.*, Que. R., 2 Q. B. 335.

(3) *Wells v. The Northern Ry. Co.*, 14 O. R. 594.

(4) *Wood v. A. & N. W. Ry. Co.*, Que. R., 2 Q. B. 335.

(5) See *Evans v. Att. & N. West Ry. Co.'s M. L. R.*, 6 S. C. 493.

rule which is now recognized as the proper one, that the amount of compensation should be equivalent to the difference between the value of the whole property at the date of the deposit of the plan and the value of the portion remaining from that taken by the Railway Company, (1) naturally the value of the whole would be governed by the state of cultivation in which it was at that time, including the value of the trees upon it. In other words, the value of the property may or may not be increased by the trees growing upon it; and if the above mentioned rule were adopted by the arbitrators, they would consider the additional value of the trees growing upon the property, and their value would be included in the valuation put upon the land. It may be said, in general terms, that the value of the land ought to include the value of the trees growing upon it, and therefore the arbitrators ought to include that value in arriving at their award, and it would be paying the proprietor twice to give him the value of the land and an additional sum for the value of each particular tree growing thereon.

It would be different in the case of crops growing upon the property which the construction of the railway would destroy before they could be reaped; in such a case the proprietor would be entitled to receive, in addition to the actual value of the land, the price of the crop which he would have been enabled to realize if the railway had not destroyed the crop. It has also been held by the Court of Appeals in Quebec, that the arbitrators may allow compensation for loss of land on each side of railway rendered unfit for cultivation. (2)

Compensation a bar to all further claim. **41.** The instances given are sufficient to show the general grounds upon which compensation by the arbitrators should be based, and it may be laid down that once this compensation has been assessed by the arbitrators and accepted by the pro-

(1) *Supra* p. 160. Compensation by a railway company is most readily and fairly ascertained by determining the value of the land without the railway, and of the portion remaining after the railway is built. The difference is the compensation to which the party is entitled. *Troy & Boston Ry. Co. v. Lee*, 13 Barb. 169, 171, *in re F Street*, 17 Wend. 649; *Canal Co. v. Archer*, 9 Gill & J. 480; *Parks v. City of Boston*, 15 Pick. 198; *Somerville Ry. Co. v. Doughty*, 2 Zab 495.

(2) *Mathieu v. Q. M. & O. Ry. Co.*, 15 Q. L. R. 300. Confirmed in Supreme Court, 19 S. C. R. 426.

prietor, he has no further claim against the company by action for any damages which may rise from the exercise of the company's powers, provided that they are exercised in a careful and proper manner, and without negligence, even though special damages may result from the exercise of these powers which were not considered by the arbitrators. So long as it was within the jurisdiction of the arbitrators to assess such damages, the proprietor would be precluded from afterwards taking an action to recover damages which could be reasonably foreseen as resulting from a proper and careful exercise of the powers of the railway. In other words, the arbitrators are presumed to have awarded compensation to the proprietor for all damage they could reasonably foresee as the possible result of the lawful and proper execution of the works by the railway company, under the powers conferred upon them by Parliament, and the proprietor is presumed to have placed before the arbitrators all the possible grounds of damage which he might suffer by such exercise of the company's powers; and he would be estopped and precluded from afterwards taking an action to recover further damages resulting from such exercise of their powers beyond those included in the award. (1)

As it was said by Baron Cleasby in *Buccleuch v. Met. Bd. of Works*: "The award cannot be explained, or varied, or extended, by extrinsic evidence of the intention of the person making it;" (2) and by Lord Blackburn in the Exchequer Chamber: "Though the judgment of a limited tribunal is not final on a question of jurisdiction, yet if that tribunal has jurisdiction, the decision of a point within its jurisdiction, whether on the

(1) *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 H. L. 418; *Croft v. L. & N. W. Ry. Co.*, 32 L. J. Q. B. 113, 3 B. & S. 436; *Todd v. Met. Dist. Ry. Co.*, 19 W. R. 720; *Darby Main Colliery Co. v. Mitchell*, 11 App. Cas. 127; and see per Erle, C. J., in *Chamberlain v. West of London & Crystal Palace Ry. Co.*, 2 B. & S. 617-638; and also *Knapp v. G. W. R. Co.*, 6 U. C. C. P. 187; *Vanhorn v. G. T. R. Co.*, 9 U. C. C. P. 264; *Lesperance v. G. W. R. Co.*, 14 U. C. Q. B. 187; *Wallace v. G. T. R. Co.*, 16 U. C. Q. B. 551; *Utter v. G. W. R. Co.*, 17 U. C. Q. B. 392; *McGillivray v. G. W. R. Co.*, 25 U. C. Q. B. 69; *Crewson v. G. T. R. Co.*, 27 U. C. Q. B. 68; *Nichol v. Can. Southern Ry. Co.*, 40 U. C. Q. B. 583; *Tolton v. C. P. R. Co.*, 22 O. R. 204; and *Lan. & York Ry. Co. v. Evans*, 15 Beav. 322; *Lawrence v. Great Northern Ry. Co.*, 16 Q. B. 643.

(2) L. R., 5 H. L. 434.

"law or the fact, cannot be received except in a Court having jurisdiction to sit as a Court of Appeal from that decision.....
"Now, in cases where an award is good on the face of it, but
"the arbitrator has made a mistake either of law or fact, if that
"mistake had been as to a matter within the arbitrator's authority, then, inasmuch as there is no Court of Appeal from the
"arbitrator, the mistake cannot be remedied, nor can the Court,
"even in the exercise of its equitable jurisdiction, set aside the
"award, unless it can be shewn that there was misconduct or
"some other equitable ground of interference. But if the mistake has been as to the extent or nature of the arbitrator's
"authority, leading him to exceed it, then, ... the award may be
"impeached as being made without jurisdiction." (1)

Under our Act the party would have an appeal to the Courts upon any question of law or fact, such appeal to be decided upon the evidence taken before the arbitrators. (2)

To summarize, it may be said that, apart from this right of appeal, where a proprietor's lands have been taken under the authority of the Act, and his damages have been assessed by the arbitrators, he cannot afterwards recover by action any damages caused by the exercise of the company's powers which it was within the jurisdiction of the arbitrators to give compensation for, and which they could reasonably foresee, unless they arise from a negligent or improper exercise of those powers, inasmuch as such damages are deemed to be covered by the award. (3)

In a recent case, however, (4) these principles were departed from by the Court of Appeals of Quebec, where it was held that a proprietor might recover, by action, interest on the amount of an award from the date of the taking possession of his land by the railway company, though it was admitted by the Court that the awarding of such interest was within the jurisdiction of the arbitrators. In face of the decision of the highest Court in England,

(1) L. R., 5 Ex. at pp. 231-232.

(2) Sec. 161.

(3) *Ubi supra* p. 186, and as to statutory remedy being exclusive and not merely cumulative, see *East & West India Dock & Birmingham Junction Ry. Co. v. Gatliffe*, 3 Mac. & Gor. 155, 3 Eng. L. & Eq. 59; *Watkins v. Great Northern Ry. Co.*, 16 Q. B. 961, 6 Eng. L. & Eq. 179.

(4) *A. & N. W. Ry. Co. v. Leeming*, Que. R., 3 Q. B. 165.

it is difficult to see how this decision can be supported in principle. The awarding of interest upon the value of the land, as compensation to the proprietor for the damage resulting to him from his being deprived of the use of it from the time the company took possession, was clearly within the jurisdiction of the arbitrators, and the damage could not only be foreseen, but was patent. While the proprietor might upon appeal under section 161 have had the award increased by the amount of the interest, representing the loss of enjoyment of his land, it would seem clear, upon the principle laid down in the cases cited, that he could not maintain an action to recover it in excess of the amount of the award.

42. The form in which the award is to be made is not specified in the Act, except in so far that it is required by section 161, ^{Form of award.} that it shall state clearly the sum awarded, and the lands or other property, right or thing for which such sum is to be the compensation ;

43. But before considering the form of the award and the ^{Desistment} essentials to its validity and on what grounds it may be ^{from notice.} attacked, it may be well to point out that the company have the power of desisting from and abandoning the notice of expropriation, and all proceedings had under it in certain specified cases under section 158 of the Act. It is there provided that in any case where the notice improperly describes the land or materials intended to be taken, or where the Company decides not to take the land or materials mentioned in the notice, it may abandon the notice and all proceedings thereunder ; but in such case the company is liable to the proprietor notified for all damages or costs incurred by him in consequence of the notice and abandonment. After such desistment the company may give a new notice, to the same proprietor or any other proprietor, for other lands or material, or for the same lands or materials differently described. Under the conditions of the previously existing Act, (1) the cases in which such abandonment might be made were not specified ; it was simply provided that the company might abandon the

(1) R. S. C., cap. 109, s. 8, § 26 ; the provisions of the present Provincial Acts are similar to those of the old Federal Act, see Appendix, sec. 158.

notice, and give a new notice as already mentioned. It was held, under the old Act, by the Quebec Court of Appeals, in the case of *The Seminary of Ste. Thérèse v. C. P. Ry. Co.*, that once the company had given notice of expropriation, and had taken possession of the lands, they could not discontinue the proceedings, even on payment of the damages incurred.

This decision was practically confirmed by the Supreme Court, (1) though not expressly, for the Court there decided that there was no appeal to that Court; but some of the judges expressed themselves as strongly of the view adopted by the Court of Appeals, namely, that once the notice of expropriation had been given and the company had taken possession of the lands, they could not retreat from that position, but must take the lands and make such compensation as the arbitrators might assess,—in other words, that the abandonment must take place while the notice is still a notice, and before the intention has been exercised by taking the lands.

The same view was taken in an early Ontario case. (2) In later cases, however, it was held that the company could desist from their notice at any stage of the arbitration proceedings before the award was rendered; (3) but that, having once desisted and given a new notice, the company could not desist from the second notice after the arbitration proceedings had begun. (4) But where the land owner had objected to two successive notices of expropriation, on the ground that the company had no right to take any part of his land, and the company desisted from both notices, and gave a third from which also they desisted, it was held that the company had not exhausted their powers of desistment, and that the land owner could not validly object to the abandonment of proceedings which he had previously contended the company had no power to take. (5) It has also been held in Ontario that a new notice must be given with the desistment, and that without it the old notice remains in force to uphold an award under it. (6)

(1) 12 L. N. 338, S. C. R. 1889, 16 S. C. R. 606.

(2) *G. W. R. Co. v. Miller*, 12 U. C. Q. B. 654.

(3) *Grimshaw v. G. T. R. Co.*, 15 U. C. Q. B. 224 and 19 Q. B. 493; *Cawthra et al. v. Hamilton and L. E. Ry. Co.*, 35 Q. B. 581.

(4) *Moore v. Central Ont. Ry. Co.*, 2 O. R. 647.

(5) *Re Hooper & The Erie & Huron Ry. Co.*, 12 P. R. 408.

(6) *Widder v. Buffalo & Lake Huron Ry. Co.*, 24 U. C. Q. B. 222.

Under the Act as it stands to-day, however, it would appear that the company could abandon their notice, and in the language of the Act "all proceedings thereunder," at any time, in the cases specified, even after possession had been taken.

The Company's engineers or surveyors may often make mistakes in the description of the lands in the notice given to the proprietor, or in the laying out of the line, and it would seem unjust in such a case that the company could not have the power to desist from their expropriation proceedings, when they discovered the mistake, which might be only after they had begun work.

In such cases it would appear that under the Act as it now stands, the company would be entitled to desist from their notice, and the proceedings had under it at any time. The language of the Act is now broader than it was before, inasmuch as it includes not only the abandonment of the notice but of all proceedings had thereunder; and it would therefore seem to give the company the right to desist from the expropriation of any land, and to take other land in its place, either from the same proprietors or others, at any stage of the proceedings. (1) At the same time, it must always be remembered that the company must pay for their mistakes, and are liable to the proprietor for all damages and costs which they have caused either by the giving of the notice or the execution of its works, or any proceedings which may have been taken under the notice.

These damages and costs may be of various kinds. If the company has commenced operations upon the land, and made excavations, or built embankments, or done other work upon the property which would disfigure it or damage it in any way, they must pay for such damages, if they abandon the property or any part of it; (2) and it might be that even though they had done no works upon the property, yet if, by the deposit of the plan and giving the notice, they had prevented the proprietor from using the land, or from selling or otherwise disposing of it, he would be entitled to any damage which he could prove resulting therefrom.

(1) See *Nehan v. St. Catharines & N. C. Ry. Co.*, 16 O. R. 459.

(2) *Wilkes v. Gzowski*, 13 U. C. Q. B. 308.

Form of
award.

44. To return to the form of the award, it must of necessity be in writing, (1) and it should be signed by the three arbitrators or by the majority of the arbitrators, at a meeting held at a time and place of which the three arbitrators had at least two clear days notice, or which had been fixed at a previous meeting (2) when the three arbitrators were present.

According to section 161 of the Act, (3) as already pointed out, the award must state clearly the sum awarded and the lands or other property, right or thing for which such sum is to be the compensation, but the person to whom the same is to be paid need not be named in the award.

The award must be final; (4) the compensation must consist of a fixed or capital sum of money, and not of future periodical payments dependent upon future events, such as the completion of a certain work. Such an award would be void for uncertainty. (5)

The lands or the right or thing for which the compensation is awarded must be not only clearly but correctly described in the award, and the award must show in a clear and precise manner that the lands are those described in the notice of expropriation, without its being necessary to have recourse to extrinsic proof to establish that fact. (6) But where arbitrators have valued the land as a whole, and not at so much by the admeasurement, an error in the extent will not invalidate the award. (7) And where the notice of expropriation and the award both described the lands expropriated as lot number 1, on the plan of the railway company deposited according to law, but in another part of the notice the lands were described as part of a cadastral lot No. 2345, and in the award as forming part of the lots 2344 and 2345, it was held by the Supreme Court that there was no uncertainty, as the wording of the notice and the award was sufficient in

(1) In the Province of Quebec it should be in notarial form, C. C. P., art. 1352, and see *Benning v. A. & N. W. Ry. Co.*, M. L. R., 5 S. C. 136, 6 Q. B. 385.

(2) Sec. 152.

(3) *Supra* p. 189.

(4) *G. W. R. Co. v. Laderoute*, 1 P. R. (Ont.) 243.

(5) *Bourgouin v. M. O. & O. Ry. Co.*, 23 L. C. J. 96, 5 App. Cases 381.

(6) *N. S. Ry. Co. v. Beaudet*, 11 Q. L. R. 239.

(7) *N. S. Ry. Co. v. Ursulines of Quebec*, Ram. Dig., 60 Q. B.

itself to describe the property intended to be expropriated and for the taking of which the compensation was awarded. (1)

In another Quebec case it was held that when the award is obscure, and does not indicate sufficiently whether the lands for which the compensation was awarded are the same as those described on the railway company's plan, the Court can demand explanations of the award, but cannot change nor modify the conclusion to which the arbitrators have come. (2) The soundness of this decision may be doubted in view of the decision of the Court of Appeals of Quebec in the case of the *North Shore Railway Co. v. Braudett* above referred to. (3) Where there is an adequate and sufficient description with convenient certainty of the land intended to be valued and of the land actually valued, such award cannot afterwards be set aside on the ground that there is variation between the description of the land in the notice of expropriation and in the award, (4) and it is not necessary to set out the lands by metes and bounds. (5)

As to what the award should and should not contain, some very clear and pertinent suggestions were made by the late Chief Justice Robinson in the Ontario case of *Great Western Ry. Co. v. Baby*, (6) where that learned judge said: "It should be clearly expressed in the first place that the sum awarded is given for the value of the lands and tenements or private privileges proposed to be purchased, (and) or the amount of damages which the claimant is entitled to receive in consequence of the intended railroad in and upon his lands (as the case may be); and that the award should either be silent in regard to any other matter on which the Statute gives any authority to the arbitrators to give a direction, or that, if the estimate has been influenced by anything which the company has engaged to do in order to lessen the inconvenience, it should be plainly expressed that the company have undertaken to do it, and the particular thing should be so defined as to leave no uncertainty and no

(1) *Beaudet v. N. S. Ry. Co.*, 15 S. C. R. 44.

(2) *N. S. Ry. Co. v. l'Hôpital du Sacré Cœur*, 15 R. L. 599, Q. B.

(3) 11 Q. L. R., 239.

(4) *Bigaouette v. The N. S. Ry. Co.*, 17 S. C. R. 363, and see *Miller v. G. W. Ry. Co.*, 13 U. C. Q. B. 582.

(5) *G. W. R. Co. v. Rolph*, 1 P. R. 50.

(6) 12 W. C. Q. B. 106.

"room for future litigation about what is to be done or allowed
 "by the company, and at what particular point in their work
 "and in what manner it is to be done. It would be better, too,
 "an undertaking under the seal of the company, securing
 "the advantage or privilege in precise terms, should be taken,
 "and if they will not give such undertaking, there shall be no
 "allowance made for such proposed advantages or privileges in
 "estimating the value or damages to be paid by the company."

The wisdom of the suggestion of the learned judge as to undertakings by the company is illustrated by several Ontario cases. For instance, where the evidence before the arbitrators had been closed, the construction committee of the railway company wrote a letter, addressed to the party to be expropriated, agreeing to certain things whereby the damage to his property would be lessened, and this letter was communicated to the company's arbitrator and the umpire, but not to the party expropriated himself until the award was rendered, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was held bad. (1)

Again, where the arbitrators stated in their award that "we
 "have taken it for granted in making this award that the said
 "C. H. shall have the right to cross the railway track from one
 "part of his property to another," the award was held not to be
 sufficiently definite or certain. (2) For the same reason, an
 award containing a reservation in the following words, "preserving
 to Dods the right to cross the railway line from one portion of
 the said land to the other," was held bad, as far at least as the
 reservation was concerned, on the ground that such an absolute
 reservation was unauthorized, and if not was so indefinite as to
 be invalid.

Remedies
 against the
 award.

45. An appeal lies from the award under section 161, where the amount exceeds \$400 to a Superior Court of the Province in which the lands are situated, upon any question of law or fact; questions of fact to be decided upon the evidence taken before

(1) *Herring v. Napanee etc. Ry. Co.*, 5 O. R. 349.

(2) *G. W. Ry. Co. v. Hunt*, 12 U. C. Q. B. 124; and see *Starnes v. Molson*, 29 L. C. J. 278.

the arbitrators as in a case of original jurisdiction. This right of appeal, however, does not affect the existing law or practice in any province as to setting aside awards. (1) Under this section it would appear that where there is clearly an error of law or fact on the part of the arbitrators apparent on the face of the award, or so appearing from the evidence and documents of record, an appeal would lie, and where the arbitrators have exceeded their jurisdiction and taken into consideration matters which they had no right to consider in assessing the amount of the compensation, or have neglected to take into consideration matters within their jurisdiction. But if these facts could only be established by extrinsic evidence outside of the award or of the record, the proper recourse would seem to be by an action to set aside the award, as also where the award contains nullities in itself, or the arbitrators have not complied with the requirements of the Act. (2) Where the arbitrators have omitted some ground of damage within their jurisdiction, it would seem that the proper course would be by appeal, and it is doubtful whether an action to set aside would lie in such case, and as to whether the arbitrators could be examined in such an action to establish such omission. (3) Where, however, the arbitrators have awarded a sum as a part of the compensation for a matter without their jurisdiction, they may be examined to establish the fact. (4)

Where the amount of the compensation is alone in question, the proper remedy would be by way of appeal, and not by action; and it has been held by the Privy Council, that in an action to set aside the award, the Court will not look at the amount of the compensation, so long as in fixing that amount the arbitrators were acting within their jurisdiction. (5) But the Superior Court of Quebec, in a later case, while holding that when all the requirements of the law have been observed, the award is final and conclusive, and the amount of the compensa-

(1) *Ibid*, par. 4.

(2) But see *M. O. & O. Ry. Co. v. St. Denis*, Que. R., 2 Q. B. 532.

(3) *Duke of Buccleuch v. Met. Brd. of Works*, L. R., 5 H. L. 418; *Wood v. A. & N. W. Ry. Co.*, Que. R., 2 Q. B. 333.

(4) *Duke of Buccleuch v. Met. Brd. of Works*, *supra*.

(5) *Bourgoin v. M. O. & O. Ry. Co.*, 5 App. Cases 381.

tion entirely within the discretion of the arbitrators, and in the absence of fraud or other particulars not subject to review by the Court, nevertheless held, that inadequacy in the sum awarded may be such as in itself to constitute proof of legal fraud on the part of the arbitrators, and in such case the Court may annul and set aside the award by reason of such fraud; but to justify such action by the Court, the sum awarded must be so grossly and scandalously inadequate as to shock the sense of justice. (1)

It may be observed with regard to this case, that the holding referred to was a dictum of the learned judge not necessary for the decision of the case, inasmuch as the award was maintained. While it may be that such scandalous inadequacy or gross exaggeration in the amount of an award as to amount to a presumption of fraud may justify the Court in setting it aside, (2) the proof would have to be of the strongest, (3) and it may be well doubted whether anything short of actual fraud would justify the Court in so doing. (4) The more proper recourse would now seem to be by an appeal upon the evidence taken before the arbitrators.

There are many grounds on which awards may be set aside by action besides those which have been already referred to. Section 161 provides that the award shall not be invalidated by reason of any want of form or other technical objection if the requirements of the Act have been substantially complied with. As to what are the requirements of the Act which must be complied with on pain of nullity, in the first place the arbitrators must be properly appointed, and though the method of the appointment of the arbitrators could be shown by any legal proof outside of the award, it is better that the method of their appointment should be shown upon the face of the award. In the case of *Atlantic & N. W. Ry. Co. v. Johnson*, (5) the judge refused to grant an order for the payment of money in accordance with the award, where it was not stated on its face in what manner the third arbitrator had been appointed.

(1) *Benning v. The A. & N. W. Ry. Co.*, M. L. R., 5 S. C. 136, 6 Q. B. 385.

(2) *Norvall v. C. S. Ry. Co.*, 5 O. A. R. 13; *G. W. R. Co. v. Baby*, 12 U. C. Q. B. 106; *G. W. R. Co. v. Dodds*, *ibid.* 133.

(3) In *re G. W. R. Co. & Chauvin*, 1 P. R. (Ont.) 288; *Wilder v. Buffalo & Lake Huron Ry. Co.*, 24 U. C. Q. B. 520, and 27 Q. B. 425.

(4) *Ibid.*

(5) 10 L. N. 228.

Then the arbitrators and the witnesses must be sworn ; and it is better that this also should be stated in the award, for it has been held that such statement on the face of the award makes sufficient proof of the fact of their having been sworn ; (1) though if it does not so appear by the award itself, the fact of their having been sworn can be established by any other valid proof. The omission to swear the arbitrators, this being one of the requirements of the Act, will invalidate the award. (2) The evidence must be taken down in writing, and as this is a requirement of the Act, failure to do so would be a ground for invalidating the award. (3) The award must be rendered within the time fixed by the arbitrators, and it is provided in the Act, as already pointed out, (4) that if it is not rendered on the day fixed, or on some other day to which the time for making it has been extended, either by consent of the parties or by resolution of the arbitrators, the amount offered by the company is to be the compensation paid. This provision of the Act is express, and it appears to be inevitable that an award rendered after the delay had expired would be a nullity, and would be set aside on action, and the amount offered by the company declared by the Court to be the only amount to which the proprietor would be entitled. The Act further requires that this day should be fixed at the first meeting of the arbitrators after their appointment, and an award was set aside by the Court of Appeals in the case of *Beaudet v. The North Shore Ry. Co.*, (5) where the arbitrators had failed to fix a day at their first meeting. The judgment, however, went on other grounds also, holding that the property was not clearly described, and that the award was uncertain. The case went to the Supreme Court, where the award was restored, the Court holding that the property was sufficiently described for the purposes of identification, and that there was no uncertainty. (6) It does not appear from the report what was the decision of the Supreme Court on the other point, but it

(1) *Mills v. A. & N. W. Ry. Co.*, M. L. R., 4 S. C. 302.

(2) *Whitfield v. A. & N. W. Ry. Co.*, 33 L. C. J. 25.

(3) The evidence may be taken by stenography if required by either party, 54-55 Vic., cap. 51.

(4) Sec. 156, and *supra*, p. 148.

(5) 11 Q. L. R. 239.

(6) 15 S. C. R. 44.

must have been adverse to the holding of the Court of Appeals, as otherwise the award could not have been upheld. Probably the Court looked upon this provision of the Act as merely directory and not imperative, and that the provision had been substantially complied with by the arbitrators having fixed a day at a subsequent meeting to the first meeting. This would appear to be a correct view to take of the matter. It is a mere matter of form whether the arbitrators fix a delay at their first meeting or at some subsequent meeting, and where the parties have proceeded with a knowledge of the fact, no doubt they would be estopped from raising this want of form in an action to set aside.

The delay for rendering the award may be prolonged either by the consent of the parties or by resolution of the arbitrators. (1) As to the manner of extending the delay, it has been held by the Superior Court of Quebec in the case of *The Curé, etc., of St. Anne v. The O. & Q. Ry. Co.*, (2) and confirmed in Appeal, (3) that where an award has been rendered long after the day fixed at the first meeting of arbitrators, and though there was no written consent of the parties and no resolution of the arbitrators fixing another day, yet the consent would be presumed from the fact that meetings had been regularly adjourned from time to time, and notice of such adjournment given to the company's arbitrator. This case would appear to be of doubtful authority, inasmuch as the consent of the party could only be presumed where he knew that the day fixed had been passed, and there was no evidence in this case to show that the company had any knowledge of what day had been fixed for the rendering of the award, and as a matter of fact, it appeared that they were not represented at the first meeting, when the day was determined on by the arbitrators. It would be different in the case of a submission in writing, signed by the parties, in which the delay for rendering the award was fixed. If the parties continued after that date to bring up witnesses, attend the meetings of the arbitrators, etc., this might imply a consent to the extension of the delay, (4) or a recognition that the arbitrators' authority had not expired.

(1) Sec. 156.

(2) M. L. R., 5 S. C. 51.

(3) M. L. R., 7 Q. B. 110.

(4) See *Earl of Darnley v. Lon., Chat. & Dover Ry. Co.*, L. R., 2 H. of L. 43.

Both parties are entitled to the opinion of the arbitrators, on one side or the other, up to the moment that the award is rendered. (1) The Act very particularly provides that the award shall not be rendered without two days' notice to all the arbitrators. This provision of the Act is in accordance with the principle that each party is entitled to the opinion, and the counsel and advice, of each arbitrator, up to the moment the award is rendered; and an award rendered in the absence of one of the arbitrators, without such notice to him, would be bad. (2)

The award in the province of Quebec is, under the provisions of the Code of Civil Procedure, (3) generally made before a notary; and even though the three arbitrators may have agreed upon the amount of the award among themselves, still, either party being entitled to have the advice and opinion of all the arbitrators up to the moment that the formal award is made before the notary, if the award is so made without the notice required by the Act, it might be properly set aside by the courts.

For instance, the three arbitrators, after having heard the evidence on both sides, and having examined the property and deliberated, cannot agree unanimously, but two of them are agreed to award a certain amount. The third arbitrator does not agree, but differs in opinion from his brother arbitrators, and, after discussion, the two arbitrators agree to award a certain amount. It is necessary for a valid award that the arbitrators should meet in a notary's office, and make a formal award, assessing the damage at the amount they have agreed upon. The dissenting arbitrator is entitled to a notice of that meeting, that is to say, the notice required by the Act of two days; and even though he may have said to his brother arbitrators that he could not agree with them, and even though they two after discussion had settled the amount of the award, still the opposite party would be entitled to his opinion up to the moment that the formal award was actually signed, because he might by argument or otherwise

(1) *Herring v. Napanee, T. & Q. Ry. Co.*, 5 O. R. 349; *Norvall v. Can. Southern Ry. Co.*, 9 A. R. (Ont.) 310.

(2) *Can. Southern Ry. Co. v. Cunningham et al.*, *Cassell's Dig.* 34; *St. Denis v. M. & O. Ry. Co.*, M. L. R., 6 S. C. 484; confirmed in Appeal Que. R., 2 Q. B. 532.

(3) C. C. P., Art. 1352; *Benning v. A. & N. W. Ry. Co.*, M. L. R., 6 Q. B. 385.

change the opinion of the other arbitrators, and the party whom he represented would be entitled to the benefit of his opinion. (1) The principle has been very strongly upheld in Ontario. It has been invariably held there that both parties to the arbitration are entitled to the benefit of the opinion of each arbitrator up to the moment that the award is rendered. (2) And in the case of *Norvall v. Canada Southern Ry. Co.*, (3) the doctrine was carried to the furthest extent. The arbitrator for the party complaining against the award had, in that case, refused to attend a meeting for the purpose of signing a formal award: that is to say, all the parties having met after hearing the evidence, etc., and it being found that this arbitrator could not agree with the others, and two of them having come to an agreement as to the amount to be awarded, it was suggested that they should meet and render a formal award; thereupon the dissenting arbitrator stated that he would not meet them again, that it was impossible for him to come to any agreement, and that there was no practical object to be served by meeting again, and he declined to meet the two arbitrators thereafter. The other two arbitrators rendered their award without having given notice to the third of the day on which the formal award was to be rendered; and it was held that inasmuch as The Railway Act required that notice must be given to the dissenting arbitrator, in order to give validity to the decision of the majority, the

(1) *St. Denis v. M. & O. Ry. Co.*, Que. R., 2 Q. B. 532. But see *Curé of Ste. Anne v. O. & Q. Ry. Co.*, M. L. R., 7 Q. B. 110, where it was held that, where the amount of compensation was entered in the minutes of the arbitrators, and on a subsequent day the award was made out in notarial form and signed by two of the arbitrators, the third not being present or notified, this did not invalidate the award previously made and entered in the minutes. This decision is in conflict with that of the same Court previously rendered in *Benning v. A. & N. W. Ry. Co.*, M. L. R., 6 Q. B. 385, wherein it was distinctly held that the notarial award, and not that entered in the minutes, is the true award; and with the subsequent decision in *St. Denis v. M. & O. Ry. Co.* (supra), that the person selecting an arbitrator is entitled to all the benefit which results from his presence, in correcting errors of fact and presenting by argument the merits of the claim, and that the formal award rendered before a notary in the absence of one arbitrator without notice to him was null.

(2) *Herring v. Nap. T. & Q. Ry. Co.*, 5 O. R. 349; *Norvall v. Can. Southern Ry. Co.*, 9 A. R. 310; *City of Toronto v. Leak*, 23 Q. B. 223; *MacDonald v. Present*, 16 Q. B. 84.

(3) 9 A. R. 310.

Court, in the presence of such a direct and absolute provision of the Statute, must annul the award. (1)

Where, however, there has been a proper adjournment, the absence of one of the arbitrators at the adjourned meeting would not invalidate the award. (2) So where the argument closed on a certain day, and the arbitrators adjourned to the next day, when after discussion one of them refused to concur with the others as to the amount of compensation, and withdrew, and the other two then signed the award, and three days afterwards acknowledged it in the presence of a witness, it was held that the award was valid both under the statute and at common law. (3)

The grounds stated hitherto have been practically matters of form, though formalities required by the Act to be observed; but there may be grounds urged which are personal to those who have rendered the award. The arbitrators themselves, the judges who assess the amount of compensation, may be recused on proper grounds. Grounds of disqualification against an arbitrator could not be urged upon an action to set aside an award, because, under the Act, these grounds must be urged before the appointment of the third arbitrator, or in the case of a third arbitrator, at the time of his appointment by the judge. (4) But if it could be shown that, at a subsequent stage of the proceedings, any of the arbitrators had been influenced by improper motives, it would be a good ground for setting aside the award. The party aggrieved by an unjust award cannot be deprived of his right to have it set aside if he can show unfair conduct or partiality, (5) fraud, collusion with the opposite party, undue influence, or incapacity on the part of the arbitrators. (6) And in fact, in practice, these have been the grounds upon which many awards have been contested, whether well founded or not; but there is no doubt that if the fact could be established, that even

(1) See also *Anglin v. Nickle*, 30 U. C. C. P. 87; *Nott v. Nott*, 5 O. R. 283.

(2) *Freeman v. O. & Q. Ry. Co.*, 6 O. R. 413.

(3) *Freeman v. O. & Q. Ry. Co.*, 6 O. R. 413.

(4) Sec. 160, *supra* p. 153.

(5) *Hamilton v. Wilson*, 4 O. S. 16. *In re McMullen & Cayley*, 2 U. C. Q. B. 175; *Bull & Bull*, 6 U. C. Q. B. 357; *Hotchkiss & Hall*, 7 L. J. N. S. 320; *Burr v. Gamble*, 4 Grant's Chy. 626.

(6) *Williams v. Roblin*, 2 Ont. P. R. 234; *Lawson v. Hutchinson*, 19 Grant's Chy. 84.

one of the arbitrators, whether the arbitrator of the successful party or of the losing party, had been so incapacitated, by drink or otherwise, as not to be capable of giving an independent and sensible proper opinion, or had been influenced in any way, or even had accepted refreshments of any kind from any of the parties, it would be a ground for setting aside the award. (1)

Appeals from
award.

46. With regard to the right of appeal given under The Railway Act by section 161, paragraph 3 provides that the proceedings upon such an appeal shall be as nearly as may be the same as upon an appeal from a decision of an inferior court to the Superior Court, subject to any rules or orders which may be made from time to time by the Courts. No rules of practice affecting such appeals have as yet been passed by our judges, so far as the author is aware. But in the Province of Quebec the

Practice.

practice adopted from the existing procedure in cases of appeals to the Superior Courts from Courts of inferior jurisdiction has been generally followed, and may be now considered as established. That practice is to apply to the court by a petition, setting forth briefly the appointment of arbitrators, the award, including a short description of the property or right expropriated, and the reasons or grounds upon which the appeal is asked for. Notice of this petition is generally given to the opposite party, though it is not essential, and a writ is then issued, and the proceedings go on summarily, before a judge of the Superior Court.

The practice in Ontario is by simple notice of motion, which is proceeded with summarily, without the issue of a summons, and without a written answer.

Bringing the
arbitration
record into
court.

47. In order to bring the papers before the Court, the arbitrators are required, at the request of either party, to transmit to the clerk of the Superior Court, by registered letter, the depositions taken before them, together with all exhibits and papers connected with the arbitration, except the award itself. (2) If they should fail to do so, a writ of mandamus or certiorari would doubtless lie to compel them to bring the papers before the Court; but the usual practice is to make the arbitrators parties (*mis en cause*), and they are thus subject to the orders of the

(1) *A. & N. W. Ry. Co. v. Bronsden*, 1893, Q. R., 2 Q. B. 470. A similar judgment was rendered the same day in an action by the same appellant against Trudel respondent.

(2) Sec. 155, *ss.* 2.

Court in the case. In Ontario they may be ordered to produce the paper on motion.

48. As to the grounds upon which an appeal may be taken, ^{Grounds of appeal.} of course if it can be shown that the arbitrators have been led into error on a question of law, their award could be set aside entirely, or modified as the case might require. For instance, if they had erroneously awarded a specific sum for damages, which the Court found they had no jurisdiction or right by law to assess, the award might be reduced by that amount, and judgment entered up for the balance, if any, appearing by the award; or if, on the contrary, they had refused to allow compensation to which the party expropriated was entitled, the Court might increase the amount accordingly.

49. But the Court has not only power to decide questions of ^{Questions of law, but to decide the facts upon the evidence taken before the} law, but to decide the facts upon the evidence taken before the arbitrators, "as in a case of original jurisdiction."

50. There has been a considerable amount of doubt as to the ^{Principles upon which Courts interfere upon questions of fact.} principle which should govern courts in adjudicating upon questions of fact upon these appeals, especially as to the grounds on which the courts would interfere with the discretion of the arbitrators as to the amount of the award, either in reducing or increasing it. In several instances, the judges of the Superior Court in Quebec have increased the amount of the award on such appeals by the proprietor, purely on the ground that the figures given by the witnesses, as being in their opinion the true amount of compensation, showed a greater amount than that which the arbitrators had awarded. (1) And in one case, the judge went so far as to take an average of the amounts sworn to by the different witnesses for each side, and arriving at his judgment by this rule of thumb, as it were, increased the amount of the award by over \$20,000. (2) This method—for it cannot be called a principle—was, however, strongly condemned by the Court of Appeals, (3) where the principle was laid down that the

(1) *Atl. & N. W. Ry. Co. v. Lavallée*, S. C. M., 8th Apl., 1889. Award increased from \$7,420 to \$8,160. Reversed in Appeal, and award restored; Q. B., 17th January, 1891. *Atl. & N. W. Ry. Co. v. Zoé Descarries*, S. C. M., 1st Sept., 1891. Award reduced from \$8,000 to \$3,600. *Atl. & N. W. Ry. Co. v. Whitfield*, S. C., 13th Sept., 1890. Award increased from \$2,600 to \$5,000. Reversed in Appeal, and award restored; Q. B., 22nd Dec., 1893.

(2) *Judah v. A. & N. W. Ry. Co.*, 20 R. L. 527

(3) *Ibid.*

courts should not substitute their judgment for that of the arbitrators, except in cases where they were shown to have fallen into gross error, (1) and the Court restored the original award of some \$30,000. In another case of *Lavallée v. The A. & N. W. Ry. Co.*, (2) where both parties had appealed from the award, and the Superior Court had increased the amount of the award upon the proprietor's appeal, the Court of Appeals again restored the award. Judge Bossé, in delivering the judgment of the Court, said that while a careful perusal of the evidence led him to the opinion that the amount of the award was about \$1300 in excess of what he himself would have given, there was not sufficient error shown to justify the Court in interfering with the discretion of the arbitrators. He pointed out that the arbitrators were persons chosen for their special knowledge and experience in such matters, and that they had the advantage not only of hearing the witnesses, and seeing the manner in which their testimony was given, but also of examining the property and the neighborhood, which facts, in his opinion, put them in a better position to decide on the amount of the award than the Courts. (3) A number of cases have since been decided by the Quebec Court of Appeals, (4) and the principle to be deduced from them appears to be that, on an appeal, the Court will not interfere with the discretion of the arbitrators unless gross error in law or in fact is shown, and that to disregard the award of the arbitrators "it would be necessary to prove that they had been influenced by improper motives, or that the evidence should show conclusively that they had made an error, and that the award was unfairly and certainly too low, or unjustly and undoubtedly too high." (5) In so holding, the Courts have followed the Privy Council in the case of *Morrison v. City of Montreal*. (6) That was a case where the proprietor, who had been expropriated, took an action under the Statute governing expropriations by the city, (7) to have the amount of an award, which had been fixed

(1) And see *Lemoine v. City of Montreal*, *Allan v. City of Montreal*, Supreme Court, 31st May, 1894, 23 S. C. R. 390.

(2) Q. B. Que., 17 January, 1891.

(3) *Ibid.*

(4) *M. & O. Ry. Co. v. Bertrand*, Q. R., 2 Q. B. 203; *M. & O. Ry. Co. v. Castonguay*, Q. R., 2 Q. B. 207; *Can. Atl. Ry. Co. v. Norris*, Q. R., 2 Q. B. 222; *Wood v. A. & N. W. Ry. Co.*, Q. R., 2 Q. B. 335.

(5) Per Wurtel J., in *M. & O. Ry. Co. v. Bertrand*, Q. R., 2 Q. B., at p. 205.

(6) 3 App. Cas. 148.

(7) 35 Vic., cap. 32.

by the commissioners under the Statute, increased. The Statute provided in effect that such an action could be taken to increase the amount of the award where there was "error" on the part of the commissioners. The judge of the Superior Court nearly doubled the amount of the award, and went upon the ground that he was absolutely bound by the evidence adduced on the action taken by the proprietor, for in that proceeding, the evidence taken before the commissioners did not come before the Court, but only the evidence taken in the action. (1) The Court of Appeals reversed the judgment, and the Privy Council confirmed the judgment of the Court of Appeals, holding that the discretion of the commissioners should not be interfered with, unless gross error was proved, and it was necessary that the plaintiff in such an action should clearly prove the error complained of. (2) That case was under a Statute quite dissimilar from the one under consideration, but the principle adopted by the Quebec Court of Appeals on appeals under The Railway Act would appear to be the same. In Ontario, where this right of appeal has existed under a precisely similar clause of a Provincial Act (3) for many years, the courts have laid down a definite and decided rule to be followed in such appeals. They have said that the intention of the Statute was not to make the judge appealed to a substitute for the arbitrators; and that the amount awarded by the arbitrators should not be increased or reduced, on the weight of evidence merely, except in the cases where the Court would increase or reduce the verdict of a jury: that is to say, if the amount awarded should be so small or so excessive as to make it evident that the jurors must have been influenced by improper motives or led into error. (4) The cases in which the verdict of a jury would be set aside by the Courts are practically the same under the Quebec law and the English law, and the rule, that the same principle should be applied to an award of arbitrators as that which would be applied to the verdict of a jury, would seem to be a proper and safe rule, were it not for

(1) Ibid at p. 157.

(2) 3 App. Cas. 148.

(3) 38 Vic., cap. 15 Ont.; R. S. O. (1877), cap. 165.

(4) *In re* Can. Southern Ry. Co. & Norvall, 41 U. C. Q. B. 195; and see *in re* MacLean and The Niagara Falls Park, 14 Ont. A. R. 20; *in re* Bush, 14 Ont. A. R. 73; and the *Queen v. Paradis*, 16 S. C. R. 716.

the language of the Act, which says that the Court shall decide questions of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction. The inference to be drawn from this language would appear to be that, upon such an appeal, it is not a question of the Court substituting its discretion for that of the arbitrators, but that the Court must examine and weigh the evidence, and decide upon that evidence whether the facts proved justified the award or otherwise, and adjudge accordingly. It has already been held by our Courts in a number of cases already cited, (1) that awards might be set aside by action for grossly excessive or inadequate compensation, but only in extreme cases. The intention of the legislature in giving a right of appeal on questions of fact seems to have been to grant a larger remedy against awards of arbitrators under the Act, than previously existed by way of action to set aside the award. The effect of the interpretation placed upon this section of the Act by the Courts in the cases before cited would tend to nullify its provisions, and place the party appealing in almost the same position as though the remedy was limited to that already existing by an action to set aside the award. The remedy by way of appeal under the Statute would be little if at all greater than that previously existing at common law. However, the Privy Council would seem to have affirmed the principles laid down by the Quebec Court of Appeals in the case of *Norris v. The Canada Atlantic Ry. Co.* (2) On an appeal to their Lordships in this case, the judgment of the Court of Appeals was confirmed. (3) But a careful examination of the judgment of their Lordships in this case will show that the holding of the Court of Appeals is not correctly stated. Sir Richard Couch in delivering their Lordships' judgment said: "The Court of Queen's Bench went fully into the matter, and laying down what they considered to be the proper test of the value of the property, arrived at the conclusion that the award ought to stand. Their Lordships entirely agree in the judgment of the Court of Queen's Bench." (4) It is true that the Court of Appeals examined the evidence taken before the arbitrators, but the

(1) *Supra* p. 204.

(2) *Que. R.*, 2 Q. B. 222.

(3) *Mussen v. Can. Atlantic Ry. Co.*, 17 L. N. 179. (4) 17 L. N. 180.

principle on which they went, to quote the language of Hall J. in rendering the judgment of the Court, was as follows: "The experts selected and appointed in this case appear to have been men of more than ordinary experience. No insinuation is made on either side against their probity and disinterestedness. They must be presumed to have taken into consideration every reason and argument *pro* and *con* which were adduced before the Court below, and which have been submitted to us, and while a Court has clearly the right under The Railway Act, to reconsider the evidence and to vary the decision of the experts or a majority of them, this power was clearly intended as a check only upon possible fraud, accidental error, or gross incompetence, and never to be exercised unless in correction of an award, which carried upon its face unmistakable evidence of serious injustice." (1)

After discussing the evidence the learned judge proceeded as follows: "While we cannot assert that the amount awarded by them is the precise conclusion, less or more, to which we would have arrived had it fallen to us to make the preliminary valuation of these damages, we do not feel certain that any other result would have more accurately represented the real depreciation which the property has sustained by this expropriation." (2) This can hardly be said to be a decision upon the evidence by the Court as in a case of original jurisdiction as provided by the Act. The formal judgment of the Court reads as follows: "Considering that it is not proved that in the award there is error, doth dismiss the appeal." (3) The Court thus seems to have followed the decision of the Privy Council in the Morrison case (4) under a different statute where it was necessary that error should be proved by evidence adduced before the Appellate Court, and where the evidence taken before the arbitrators was not before the Court. The Lordships of the Privy Council, however, evidently did not look with favor upon appeals in such cases as was said by Sir Richard Couch. "They think, looking to the fact, that this was the decision originally of a majority of arbitrators, who were said in the judgment of

(1) *Can. Atlantic Ry. Co. v. Norris*, Que. R., 2 Q. B. at p. 226.

(2) *Ibid*, p. 229.

(3) *Ibid*, p. 229.

(4) 3 App. Cas. 148.

"the Court of Queen's Bench to have been experts, and to
"have been men of more than ordinary business experience, and
"looking further to the fact that the arbitrators had the advantage of seeing and hearing the witnesses who were examined
"before them, that an appeal from a decision given in such
"circumstances, upon a question which was merely one of value,
"is one which should be discouraged." (1)

Since the decision of this case, the question as to the true interpretation to be placed upon this section of the Act has been finally decided by the Privy Council, after full argument, in the case of *The Atlantic & North West Ry. Co. v. Wood*. (2) This appeal was argued solely upon the ground, that under the Statute the Court below should have examined and weighed the evidence, and decided upon it whether the amount awarded was justified; and that the Court had failed to do so, and had proceeded upon the principles previously laid down by them in the Norris case. Their Lordships held that the Court below had sufficiently complied with the Statute. Lord Shand in delivering the judgment said:—"The Court dealt with the
"award as one which it was their province to review on the
"facts as appearing on the evidence adduced before the arbitrators, and in so doing in the opinion of their Lordships they
"acted rightly and in accordance with the statute. It would
"be a strained and unreasonable reading of the words of the
"statute, 'as in a case of original jurisdiction,' to hold that the
"evidence was to be taken up and considered as if it had been
"adduced before the Court itself in the first instance and not
"before the arbitrators, and entirely to disregard the judgment
"of the arbitrators and the reasoning in support of it. Such a
"reading of the statute would really make the Court the arbitrators and the sole arbitrators in every arbitration in which
"an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was
"not the intention of the Legislature, and that what was intended by the statute was not that the Court should thus entirely
"supersede and take the place of the arbitrators, but that they
"should examine into the justice of the award given by them

(1) Per Sir R. Couch, 17 L. N. 180.

(2) 18 L. N. 140, 11 R. 26.

" on its merits, on the facts as well as the law. Previously to
 " this enactment the Court had power only to approve of or set
 " aside the award of arbitrators. This might often cause much
 " expense and inconvenience in renewed proceedings before
 " the arbitrators, and the purpose of the Legislature seems to
 " have been to enable the Court to avoid this, by giving power
 " to make or rather to reform the award by correcting any
 " erroneous view which the arbitrators might have taken of
 " the evidence; that, in short, they should review the judgment
 " of the arbitrators as they would that of a subordinate Court,
 " in a case of original jurisdiction, where review is provided
 " for." (1)

51. The effect of the award as to costs depends upon the ^{Costs of arbi-} amount of the compensation awarded as compared with the amount ^{tration.} offered by the company. If the amount awarded is greater than that offered by the company, the company must pay the costs, but otherwise they must be paid by the proprietor,—that is to say, if the amount is equal to or less than the amount offered. In the latter case, the costs may be deducted from the amount of compensation awarded. (2)

Notwithstanding the apparently clear provisions of the Act on this point, a serious question as to its interpretation was raised in an Ontario case.

On the day that the arbitrators met, the railway company executed an agreement for a crossing over the proprietor's land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration,—the company because the award was less than their offer, and the owner because the value of the crossing should be added to the sum awarded, which would make it greater than the offer. It was held that under the circumstances neither party was entitled to costs. (3)

(1) 18 L. N. at p. 145, 11 R. May at p. 31.

(2) Sec. 154.

(3) Ontario & Quebec Ry. Co. v. Philbrick, 12 S.C.R. 288; 5 O. R. 674.

The amount of the costs, if not agreed upon between the parties, may be taxed by the judge. (1) These costs include the fees of the witnesses, the arbitrators, (2) and of the counsel representing the parties before them, and are practically within the discretion of the judge, and the decision of the judge in such a case cannot be appealed from. He is a *persona designata* under the Act, and consequently there is no appeal from his decision. (3)

The Courts have refused to allow special fees to witnesses for the time expended in examining the property prior to giving their testimony, or preparing a report for the benefit of the party in whose favor they were to give testimony. (4) The arbitrators themselves seem to have no power under the Act to award costs in favor of either party. They can only assess the compensation and damages to which the proprietor is entitled; and awards giving costs to either party have been held to be bad in that respect, but may be abandoned as to the part awarding costs, and remain valid as to the compensation. (5) The costs are to be taxed by the judge, according to the amount of compensation

(1) Sec. 154.

(2) Arbitrators' fees may be referred to the master for taxation. *Scott v. G. T. R.*, 3 Ont. P. R. 276.

(3) The taxation of a bill of costs by a judge in chambers under the authority of The Quebec Railway Act is not subject to revision by another judge sitting in banc. *Mailhot et al. v. Burroughs*, 1 L. N. 291; 22 L. C. J. 100. 1878.

A judge of the Superior Court may, in his discretion, allow fees to counsel on an arbitration to fix the indemnity to be paid for lands taken by a railway company conducted under the provisions of The Quebec Railway Act, 43-44 Vic., cap. 43, § 9, and there is no power in the Court to revise such taxation. *The Montreal & Sorel Ry. Co. v. Vincent et al.*, Q. B., Nov. 24, 1884; M. L. R., 4 Q. B. 404; and see *Jenkins v. Central Ontario Ry. Co.*, 4 O. R. 593; *Can. Pac. Ry. Co. v. Seminary of Ste. Thérèse*, 16 S. C. R. 606; and *In re Kingston & Pembroke Ry. Co. v. Murphy*, 11 Ont. P. R. 304.

(4) *Atlantic & N. W. Ry. Co. v. Walker*, No. 216 S. C. M. 20th April, 1889.

(5) Held, no objection to award that arbitrators awarded costs, for if unauthorized it was separable from the rest of the award. *Widder v. Buffalo & Lake Huron Ry. Co.*, 24 U. C. Q. B. 520.

The assessment of costs by arbitrators named under the provisions of the Statutes does not vitiate their report. *Tremblay v. The C. & St. L. Ry. Co.*, 5 L. C. R. 219, Q. B.

Arbitrators, in addition to other findings, awarded the plaintiff all the costs of reference and award.

Held, that part of the second award directing payment of the costs of the reference and award was bad, but might be abandoned. *Rector and Churchwardens of St. George's Parish v. King*, 2 S. C. R. 143.

awarded by the arbitrators, and they have no discretion in the matter whatsoever. No provision is made for the recovery of costs, but only for their taxation. The Courts will therefore refuse to make an order for payment of such costs, the remedy being by action of debt on the statutes. (1)

52. Questions have arisen as to interest upon the amount of Interest. the compensation, and have excited some discussion in our Courts. It has been urged with great force that where the company took property which was producing fruits or revenue, it was bound to pay interest on the value of the property from the date of the taking of possession. And the principle involved in this contention cannot be doubted, for it has often been held that where a party agrees to sell a property producing revenue, and a price is agreed upon, the buyer is bound to pay interest from the date of his taking possession of the property, even though the actual deed of sale for the price agreed upon is not executed until a later date. It has been therefore urged that the proprietor is entitled to interest upon the amount of the award from at least the date of taking possession, if not from the date of the deposit of the plan, which, as has been already pointed out, is the date fixed by the act with regard to which the compensation is to be assessed. And in cases where the company had paid money into Court, in order to obtain possession of the property before the rendering of the award in the manner provided by the act, (2)

Where the Land Clauses Consolidation Act contained special provisions respecting claims for compensation for lands affected by the works of a railway, and directed that (except in certain special cases) compensation should be awarded with costs, and where the special Act declared that the provisions of the general Act were, "except where expressly varied by the special Act," incorporated with it; and where the general Act provided that the compensation awarded might be recovered with costs, but the special Act contained no specific directions as to the award and costs, and where the arbitrator in awarding compensation said nothing about costs, Held, that the claimant was entitled to costs.

Held, also, that the right to costs was entirely independent of the taxation of them, and an action could be maintained for the costs, although the amount of such costs had not been previously settled or ascertained, and consequently an order for the taxation made by the learned judge on giving his judgment for the plaintiff was a valid order. *Metropolitan District Ry. Co. v. Sharpe*, L. R., 5 App. Cas. 425.

(1) *In re Foster and G. W. Ry. Co.*, 32 U. C. Q. B. 503.

(2) Sec. 164.

on several occasions the Courts have allowed interest to the proprietor, upon the amount of the award from the date of taking possession. (1) This would not seem to be in accordance with sound principle, inasmuch as the amount of the award includes not only the value of the land taken, but the damages to the remaining portion of the land, of which the proprietor had not been deprived of the use, and which were not due or owing by the company until they had been assessed. In any event, the proprietor would only be entitled to interest upon the value of the land, and that only from the date at which he had been deprived of the use or enjoyment of it; and the answer to the claim of the proprietor to receive such interest in addition to the amount of the award would be that this deprivation of use and enjoyment was a damage consequent upon the exercise of the powers of the railway, which the arbitrators had power to assess, and which they must have been presumed to have assessed by their award. (2) The question has now been finally decided by the Court of Appeals in the case of *Reburn v. The Ontario & Quebec Railway Company*, (3) confirming the judgment of Mr. Justice Tait in the Superior Court. (4) That learned judge held, upon an action by the proprietor to recover interest in addition to the amount of the award from the date of the deposit of the plan, that it being within the scope of the powers of the arbitrators to award interest for any loss of enjoyment which the proprietor might have suffered, it must be presumed that the arbitrators had taken this into consideration, and that the proprietor could not go back of the award and claim interest which was really part of the damages which the arbitrators had power to assess; and his judgment was unanimously confirmed by the Court of Appeals.

Award as a
title to the
lands.

53. It is provided by section 162 of the Act, that upon payment or tender of the amount of the compensation awarded or agreed upon, the award itself or the agreement shall vest in the

(1) *A. & N. W. Ry. Co. v. Prudhomme*, M. L. R., 2 S. C. 21; *re Philbrick v. Ont. & Que. Ry. Co.*, 11 Ont. P. R. 373; *re Taylor v. Ont. & Que. Ry. Co.*, *ibid.*, 371; *re Lea*, 21 C. L. J. 154.

(2) *Paradis v. The Queen*, 1 Ex. (Can.) 191.

(3) M. L. R., 6 Q. B. 381; and see *A. & N. W. Ry. Co. v. Leeming*, Q. R., 3 Q. B. 165.

(4) M. L. R., 5 S. C. 211.

company the power to take possession of the lands, or to exercise the powers upon the lands which the company have specified in their notice, or which the proprietor has agreed that they should exercise. In the case of resistance by the proprietor, the company, on application to a judge, may obtain a warrant to the sheriff or to a bailiff to put the company in possession, in spite of any resistance or opposition. The compensation fixed by the award stands instead of the lands under sec. 166 of the Act, and any claims upon the property, such as mortgages or hypothecs, are converted into a claim upon the money awarded, and the company are only responsible if they pay any part of the award to any person not entitled to receive it, saving their recourse against such person. (1)

In Ontario it has been held that this section applies only where the compensation has been actually ascertained and paid into Court. (2)

A railway company had, under a warrant of a County Court judge, taken possession of a portion of mortgaged lands, and had constructed their railway thereon, and an arbitration had been held between the company and the mortgagors; but at the time of the bringing of an action by the mortgagees, the award, though made, had not been taken up by either party. The mortgagees (plaintiffs) had received no notice of, and had taken no part in the arbitration proceedings, and had not given any consent to the taking of the possession. The plaintiffs brought an action against the railway company and the owners for foreclosure, offering in their claim to take the compensation awarded, and release the lands in the possession of the railway company. In the first Court, Sir Thomas Galt, C.J., gave the usual judgment for redemption or foreclosure as against the mortgagor, but dismissed the action as against the railway company, holding that as to them it was in effect an action in ejectment, and that any claim to the lands was by force of subsection 25 of section 20 of The Railway Act of Ontario, R. S. O., ch. 170 (section 166, The Railway Act), converted into a claim against the compensation. In the Court of Appeals, however, this judgment was reversed. (3)

(1) See *supra*, p. 143.

(2) *Scottish Amer. Investment Co. v. Prettie*, 20 Ont. A. R. 398; but see *Clarke v. Grand Trunk Ry. Co.*, 35 U. C. Q. B. 57; *Chewett v. Great Western Ry. Co.*, 26 U. C. C. P. 118.

(3) *Scottish American Investment Co. v. Prettie*, 20 Ont. A. R. 398.

Osler, J.A., for the Court, said: "The incumbrancer is, in my opinion, in such case entitled to proceed upon his mortgage in the usual way. It cannot be said that the compensation has already been ascertained, and until that has been done, it appears to me that subsection 25 of section 20 R. S. O., ch. 170, cannot be invoked by the company against the incumbrancer. The company always have it in their power to bring it into operation by proceeding with their arbitration and taking up the award. Sub-section 23 then enables them to defend themselves against further proceedings by the incumbrancer, by paying the amount awarded 'to the party entitled to the same,' who is by sub-section 25 the incumbrancer to the amount of his claim.

"It is not for the latter to take up the award, paying the arbitrator's charges which he would probably have no right to recover back from anyone, but it is for the company to entitle themselves to possession, or to defend themselves from further proceedings, by ascertaining and paying the amount of compensation.

"When the award has been taken up, the incumbrancer is no doubt entitled to recover the amount from the railway company (*Dunlop v. Township of York*); (1) but until that has been done, it is difficult to see what remedy the investment company would have if they are not entitled to enforce their mortgage.....

"The appeal should therefore be allowed, and an order declaring that the plaintiffs are entitled to the usual judgment in a mortgage action, but that upon payment of the amount awarded, the lands in occupation of the company should be released from their mortgage." (2)

In order to provide a means by which the company should be enabled to avoid any case of this kind, it is provided by the Act (3) that if there is any reason to fear any such claims upon the property, or if the proprietor refuses to execute a deed of sale or give a guarantee against such claims, or if the persons entitled to payment cannot be found, or in fact if, for any other reason, the

(1) 16 Grant Ch. 216.

(2) 23 Ont. A. R. at p. 402; and see *In re Toronto Belt Line Ry. Co. and Western Can. L. & S. Co.*, 26 O. R. 413.

(3) Secs. 167-170; and see sec. 140.

company think it advisable, (1) they may pay the amount of the award into court with interest for six months, that is to say, for six months from the date of the award, with a copy of the award. On such deposit, the award is equivalent to a title to the property in favor of the company; and thereupon proceedings are taken for the confirmation of the title in the same way as in any other such case, with the only difference that in the notice which the prothonotary or clerk of the court is required to give, he must state that the title of the company is under the Railway Act, and call upon all persons to file their claims, and then the claims are settled by the court. A judgment of confirmation being rendered on these proceedings, the company is given a perfect title to the land, clear of all claims of any kind whatsoever, including not only mortgages, hypothecs and encumbrances of every description, but also of dower not yet opened; and the court is given power to make such order for the payment and distribution of the money as it may see fit amongst the parties entitled to it. The court has power to order the payment of costs either by the company or any other person, as it may see fit. As to interest, if the judgment is obtained in less than six months from the payment of the amount of the award into court, a proportionate amount is returned to the company, and if from any fault or neglect of the company it is not obtained within that period, the company must pay in to the prothonotary the interest for such further period as is right, according to the order of the court. (2) As has been pointed out, upon payment into Court of the amount of the award, the company can take possession at once; but even before the rendering of the award, the company can obtain possession under sec. 163 upon a warrant granted by the judge, upon affidavit sufficient to satisfy him that immediate possession of the property is necessary to carry on some part of the works of the railway with which the company is ready to proceed at once, (3)

(1) As to what would constitute a sufficient reason, see *Cawthra v. Hamilton & N. W. Ry. Co.*, 41 U. C. Q. B. 187.

(2) As to further interest see *Judah v. A. & N. W. Ry.* 23 S. C. R. 231; and *in re Foster and Gt. W. Ry. Co.*, 32 U. C. Q. B. 503.

(3) It must be clearly established that the company has an indisputable right to acquire the land by compulsory proceedings; and that there is some urgent and substantial need for immediate action. *In re Kingston & Pembroke Ry. Co. and Murphy*, 11 Ont. P. R. 304. There is no remedy by way of appeal from the order of a judge under this section, unless the company is seeking to attain an object collateral only to that for which it was incorporated. *Ibid.*, and *Jenkins v. Central Ont. Ry. Co.*, 4 O. R. 593.

and this warrant may be granted not only for land which is to be taken for the actual construction of the railway thereon, but for any land which is required for the exercise of any of the powers of the railway, such as the obtaining of material for its construction, etc. But this provisional warrant of possession can only be obtained on certain conditions. Under sec. 164, ten days' previous notice must be given to the proprietor, or the person interested in the property, and security must be given by the company to the satisfaction of the judge, by the deposit in a bank specified by the judge, to the joint credit of the company and the person interested, of an amount larger than the judge's estimate of the probable compensation, and not less than one-half more than the amount offered by the company by their notice.

These provisions of the Act are in accordance with the principle generally recognized in civilized countries, that no individual can be deprived of his property, except for purposes of public utility, and upon previous payment of indemnity. Under the Act, a railway company cannot take possession of any person's property, without either paying the amount of compensation agreed upon, or fixed by an award of arbitrators, or without paying in to a bank, as security, under an order of the judge, an amount amply sufficient to cover the indemnity which may be finally fixed or agreed upon. This principle has been so far upheld by our Courts that it has been frequently decided that, if a railway company take a property for the construction of its road, without having given compensation or security as provided by the Act, the company cannot only be sued by the proprietor for compensation (1) or by possessory action to obtain possession of the property taken, and to compel the company to vacate, but the company may be restrained by injunction from operating its railway across such property. (2) These decisions are merely

(1) *Parkdale v. West*, 12 App. Cas. 602; *Pion v. N. S. Ry. Co.*, 14 App. Cas. 612; *Mason v. South Norfolk Ry. Co.*, 19 O. R. 132.

(2) *Brewster v. Mongeon*, M. L. R. 3 Q. B., 20; *Beauharnois Junc. Ry. v. Bergevin*, 17 R. L. 113; *Cathedral of the Holy Trinity v. West. Ont. Pac. Ry. Co.*, 14 O. R. 246; *Cie. de Ch. de Fer Central v. Legendre*, 11 Q. L. R. 106, Q. B. If, however, an award has been made, but the amount has not been paid or put into Court, the proprietor is not entitled to an injunction nor to an order for possession, but to a judgment declaring him to have a vendor's lien on the property, with such provisions as are necessary to realize by means of a sale. *Slater v. Can. Central Ry. Co.*, 25 Gr. Ch. 363; *Lincoln Paper*

in accordance with the principle that a railway company, in exercising the powers of eminent domain granted by the Legislature, must conform strictly to the conditions imposed by Parliament, and that every individual whose rights of property are invaded by the railway company in excess of those powers, is entitled to redress at the hands of the Courts.

Mills Co. v. St. Catharines & Niagara Ry. Co., 19 O. R. 106; and see Galt v. Erie & Niagara Ry. Co., 19 U. C. C. P. 357; Paterson v. Buffalo & Lake Huron Ry. Co., 17 Gr. Ch. 521; Thompson v. Can. Central Ry. Co., 3 O. R. 136; Banque d'Hochelaga v. M. P. & B. Ry. Co., M. L. R., 1 S. C. 150; confirmed in appeal, 19th January, 1884. As to Crown lands, see Atty. Genl. v. Midland Ry. Co., 3 O. R. 511; Corp. of County of Welland v. Buffalo & Lake Huron Ry. Co., 30 U. C. Q. B. 147; Booth v. McIntyre, 31 U. C. C. P. 183.

CHAPTER VIII.

CONSTRUCTION OF THE RAILWAY.

CONTRACTS FOR CONSTRUCTION.

1. *Generally.*
2. *Form of—Necessity of seal, etc.*
3. *Conditions and stipulations.*
4. *Construction of particular contracts—Evidence—Quality of work—Claim for increased price.*
5. *Bond—Condition—Mutuality.*
6. *Evidence of contract—Ratification—Question for the jury.*
7. *Ratification of contract—Repudiation of part.*
8. *Condition precedent—Independent agreement.*
9. *Contractor purchaser of land for construction—Title.*
10. *Apportionment—Land grant—Subsidy.*
11. *Specific performance.*

LIABILITY OF COMPANY FOR ACTS OF CONTRACTORS.

DAMAGE CAUSED BY CONSTRUCTION OF RAILWAY.

1. *Interference with ditches and water-courses.*
2. *Surface water.*
3. *Quebec Law.*
4. *Obstruction and diversion of water-courses.*
5. *Navigable waters.*
6. *Subsequent purchaser of land.*
7. *Duty of the Crown.*

HIGHWAYS.

1. *Interference with.*
2. *Approval of Railway Committee. ✓*
3. *Bridges connecting Highways.*
4. *Signboards.*

FARM CROSSINGS.

BRIDGES, TUNNELS, ETC.

FENCES AND CATTLE GUARDS.

INTERSECTION OF RAILWAYS.

PRESCRIPTION OR LIMITATION OF ACTIONS.

Contracts for Construction.

Generally.

1. Railways are generally constructed in this country under contracts made with contractors for the whole, or different parts of the works. Sometimes, though comparatively seldom, the work is done by the company under the supervision of their engineers and a manager of construction. It is under the first mentioned system that most of the questions calling for judicial interpretation have arisen.

Form of—
necessity of
seal, etc.

2. No special form of contract is necessary, unless there is express provision in the charter or by-laws as to the form. There

is much divergence of opinion as to the necessity for contracts being executed under the seal of the company, in order to be valid and binding upon the company. While it is usual to affix the company's seal, it is by no means clear that it is essential to the validity of the contract, especially in this country.

The undoubted rule of the early common law was that a corporation aggregate must, in general, contract by deed, and could not bind itself by parol. As regarded municipal and ecclesiastical corporations, exceptions to the above rule were from very early times allowed in order that they might be enabled, without the formality of sealing, to transact matters of minor importance and of daily occurrence.

As regards trading corporations, the exceptions to the rules at common law have gradually and largely extended; "for the doctrine now is," says Mr. Broom (1) writing in 1869, "that a body corporate, established for the purpose of trading, may make all such contracts as are of ordinary occurrence in that trade,—irrespective of the magnitude of the particular transaction—without the formality of a seal, and that the seal is required only in matters of unusual and extraordinary character, which are not likely to arise in the routine of business." (2)

In the United States the rule has almost, if not entirely, disappeared. (3)

Mr. Dillon in his work on Municipal Corporations (4) states the law thus:—"The modern rule is that corporations may be bound by contracts not under seal, and the circumstances under which they will be bound have been stated by Story, J., in terms which have been approved by the courts in nearly every State in the Union. Whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation. (5) This is practically the view adopted by our Supreme Court in the case of *Bernardin v. Municip-*

(1) Broom, Common Law, p. 563.

(2) Citing *South of Ireland Co. v. Waddle L. R.*, 3 C. P., 463, 469, 474, where the cases are considered.

(3) Parson's Contracts (1892), Vol. I, p. 139, 1 Redfield, § 113.

(4) 4th Edn., § 192.

(5) Also Cook on Stockholders and Corp. Law (1889), § 721.

ality of *North Dufferin*. (1) But this case only settled the point in so far as it relates to executed contracts, the difference between executory and executed contracts being recognized. Lord Justice Lindley, in his late work upon the law of companies, (2) treats this distinction as exploded, stating "a distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable, a corporation is no more bound by a contract not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party." Gwynne, J., in the *Bernardin* case states it as his opinion that it is sound law to hold that the principle contended for in that case applies both to executory and executed contracts, and that such is the sense of the best English cases. Patterson, J., in the same case, (3) said:—"The question, whether an executory contract made by the council of one of these municipalities, not under the corporate seal, can be enforced against the corporation, should, I think, be considered as an open question. It is not necessary now to decide it because this contract is executed. It has not for the same reason been fully argued. I therefore say no more with regard to the point than that there is room for argument on both sides of the question."

The law in this country upon the point in question, so far as it relates to executed contracts, must be regarded as having, from the earliest days, departed from the English doctrine, and approached that of the United States. In *Pim v. the Municipal Council of the County of Ontario*, (4) a case involving exactly the same point as the *Bernardin* case, Chancellor Blake remarked that "the present state of the law upon the subject is a reproach to the administration of justice in England. It may be that the evil calls for legislative interference; but if the legislature will neither declare the law nor alter it, courts of justice are bound to place their decisions upon some principle intelligible to the public and sufficient for their guidance;" he then proceeds to review the English cases, noting the divergence of opinions, and

(1) 19 S. C. R. 581, and see *Canada Central Ry. Co. v. Murray*, 8 S. C. R. 333.

(2) p. 226. (3) p. 635.

(4) 9 U. C. C. P. 302.

ends by adopting the view concurred in by the courts of Ontario for the last thirty years, and finally upheld by the Supreme Court in the Bernardin case. In the course of his judgment the learned chancellor made the following argument:— "It is now well settled that corporations aggregate are liable in tort, although there has been nothing under the common seal authorizing the agent or adopting his acts; again, when land has been used and occupied by a corporation, the law implies a promise to pay a reasonable compensation; and when money has been wrongfully received, assumpsit for money had and received may be maintained. Now, if trover and trespass may be maintained under the circumstances to which I have alluded, and if the law implies a contract when land has been used, or moneys wrongfully received, it is difficult to understand why the same principle should not be applied wherever the contract being legal has been executed, and the corporation has received all that it could have demanded if there had been a contract under the corporate seal. The argument seems to me, I must confess, conclusive." But the learned chancellor, it will be noted, draws a distinction between executed and executory contracts. It is noticeable that Canadian cases, holding that the corporate seal is not necessary to the enforcement of an executed contract, proceed chiefly upon the equitable ground that the corporation, having received the benefit of the contract, they are estopped from repudiating it, and not upon the general ground that the seal is no longer a necessary formality of corporate contracts. As to executory contracts, the question, as stated by Patterson, J., in the Bernardin case, is an open one.

In this connection it was held in a Manitoba case (1) that the engagement by a railway company of a civil engineer was not binding upon the corporation, not being under the corporate seal. In this case it was admitted, in accordance with the English authorities, that an inferior servant can be retained by parol, but that it was clear the plaintiff in this case could not be called an inferior servant.

In an Ontario case (2) it was held that a clerk hired for a

(1) *Armstrong v. Portage, Westbourne & North West Ry. Co.*, 1 Man. 344 (1884), Q. B.

(2) *Hughes v. The Canada Permanent Investment, etc., Soc.*, 39 U. C. Q. B. 221.

year at \$800 per annum could not sue for dismissal within the year for the same reason as the above.

These, and another Ontario case not reported, (1) were all based upon the English decision of *Austin v. The Guardians of Bethnal Green*, (2) where it was held that poor law guardians are not bound by an unsealed agreement engaging a clerk. But it is surely erroneous to apply the case of this class of corporations to that of modern commercial corporations and railway companies; and in this country, the above decision, holding that the hiring of a clerk at \$800 per annum must be under the corporate seal, would at this date be wholly untenable, and even impossible.

Probably the future rule adopted in this country will be that adopted by Pollock, B., in *The Australian Steam Navigation Co. v. Marzetti*, (3) and approved by Gwynne, J., in the *Bernardin* case, viz.:—"It is now perfectly established by a series of authorities, that corporations may, with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience, and in accordance with common sense." The same view was taken in the United States in the case of *Fleckner v. United States Bank*, (4) where it was urged that a corporation could not authorize any act to be done by an agent by a mere vote of the directors, but only by an appointment under its corporate seal. But the court declared that such a doctrine, whatever may have been its original correctness as applied to common-law corporations, had "no application to modern corporations created by statutes, whose charters contemplate the business of the corporation to be transacted by a special body or board of directors; and the acts of such a body or board, evidenced by a written vote, are as completely binding upon the corporation and as complete authority to their agents, as the utmost solemn acts done under the corporate seal."

In the recent Supreme Court case of *The Watrous Engine Works Company v. The Corporation of the Town of Palmers-*

(1) *Washbourne v. The Canada Car Co.*, referred to in a note at p. 299 of the former case.

(2) L. R. 9 C. P. 91.

(3) 11 Ex. 228.

(4) 8 Wheat. (U. S.) 338, 357.

ton, (1) the Bernardin case was distinguished; but Patterson, J., stated that the general doctrine touching the mode in which a corporation can be bound by contract was not really in question.

Conformably to the above views, it has been held in Ontario (2) that a railway can appoint an agent to negotiate for and obtain municipal aid by a resolution of the board of directors, without the formality of a by-law or seal of the company. Also in *The Hamilton & Port Dover Ry. Co. v. The Gore Bank*, (3) it was held that a railway company, being indebted to a bank, the officers of the company had authority to arrange with the bank, that the latter had authority to garnish certain debts due to the company, without a resolution of the board of directors, and that the same need not be under the corporate seal; on the other hand it was held in an early Ontario case, (4) that an agreement made by a railway company, through their attorney, to compromise a suit instituted by plaintiff, on certain terms, was not binding upon the company in the absence of the corporate seal. But it was held in a New Brunswick case, (5) that notice by a company's solicitor to the sureties on a bond, conditioned for the fidelity of a clerk in the company's employ, to the effect that the clerk had made default, did not require to be under the seal of the company, neither did the solicitor's appointment.

Also in Nova Scotia, that where work is done within the ordinary range of duties of a corporation, a contract under seal is not required. (6) In an Ontario appeal case, it was held that a verbal contract made between a railway company and a person to manage one of their steamers need not be under seal. (7)

But where an agent was hired by a railway company to obtain bonuses from municipalities, and the only evidence of the hiring was a letter written by one of the directors, stating that at a meeting of the board he was directed to make arrangements with the plaintiff to proceed forthwith, and it was shown that the president had recognized and adopted his services, and partially paid

(1) 21 S. C. R. 556.

(2) *Wood v. The Ontario & Quebec Ry. Co.*, 24 U. C. C. P. 334.

(3) 20 Grant Chy. 190.

(4) *Doran v. The Great Western Ry. Co.*, 14 U. C. Q. B. 403.

(5) *The Mechanics' Whale Fishing Co. v. Kirby*, 1 All. 223.

(6) *McIntosh re Commissioners of the Court House at Halifax*, 20 N.S. 430.

(7) *Ellis v. The Midland Ry. Co.*, 7 Ont. App. 464.

therefor; it was held that this was not a sufficient proof of the plaintiff's engagement, or of the acceptance of his services by the company. (1) In Quebec, however, the engagement by a railway company of a civil engineer, for carrying out the works of a railway, is held to be a commercial contract, and may be proved by parol. (2) In *Canada Central Railway Co. v. Murray* (3) a contract for fencing made with the Company's managing director was held valid although not under seal. And amongst other decisions holding a seal to be unnecessary may be cited the following Ontario cases. To a declaration alleging that the plaintiffs entered into an agreement with the defendants to perform certain stone work, which they partly performed, and averring as a breach that the defendants had prevented them from carrying out and completing the work, whereby, etc., the defendants pleaded the plaintiffs were an association incorporated under R. S. O. (1877), c. 158, and that the agreement was not under the plaintiff's seal, it was held, on demurrer, that the plaintiffs being a trading corporation, enough was not shown to make the absence of a seal fatal to the validity of the agreement. (4)

In another case the plaintiffs were a company incorporated under C. S. C., c. 63, and 24 Vict., c. 19, for the manufacture and sale of cheese, etc. On the 10th August, 1878, a written agreement was entered into between one C., the plaintiffs' secretary and salesman, and one M., on behalf, as was stated, of the plaintiffs and defendants respectively, and which was signed by C. and M. for the sale of the whole of the plaintiffs' July cheese, as also of their August, September and October cheese, at prices named: it was held, that the plaintiffs being a trading corporation, and the contract one specially relating to the objects and purposes of the company, it was binding upon them, though not under seal. (5)

And it has also been held that a contract made verbally by the president of a company with the plaintiff, engaging him for

(1) *Wood v. The Ontario & Quebec Ry. Co.*, 24 U. C. C. P. 334.

(2) *Legge v. The Laurentian Ry. Co.*, 3 L. N. 23.

(3) 8 Can. S. C. R. 313.

(4) *Ontario Co-operative Stonecutters' Association v. Clarke*, 31 U. C. C. P. 280.

(5) *Albert Cheese Co. v. Leeming*, 31 U. C. C. P. 272.

"the season" as master to manage a steamer, might be binding, and that non-suit for want of a corporate seal was properly set aside. (1) In a later case the facts were stated that D., on the suggestion of R. and the Bank of O., that he should purchase certain lumber held by the bank as security for advances made to R., required a guarantee from the bank that the lumber should be satisfactorily culled and any deficiency paid for by the bank. The directors thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily to give the guarantee. Their local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank," that the lumber should be satisfactorily culled previous to shipment:—It was held, that no seal was required; and if the Bank wished to repudiate it, they should repay the money paid to them by D. for the lumber. (2)

However much the jurisprudence may differ in the various cases which have been given as illustrations, it would seem to be sound law, and in accordance with common sense, to say that contracts for the construction of the railway, entered into for the carrying out of the very purposes of the company's charter, would be binding upon the company even if not under the corporate seal, when executed by an authorized officer:—provided always of course that they contain no provisions or stipulations *ultra vires* of the company.

3. It is customary to insert in construction contracts, conditions and stipulations which in ordinary contracts would perhaps be looked upon as unusually harsh and severe. For instance, such as the imposition of penalties upon the contractor for the slightest deviation from the strict letter of the contract; the stipulation that the company should have the right to take the work from the contractor, whenever their engineers should decide that the work was not progressing with sufficient rapidity or in a proper manner, or to put on an extra force of laborers if the

Conditions
and stipulations.

(1) *Ellis v. Midland Ry. Co.*, 7 Ont. A. R. 464.

(2) *Dobell v. Ontario Bank*, 3 O. R. 299.

number employed by the contractor is deemed insufficient. (1) And it is a most usual condition to make the company's engineers the sole and final judges of the quality and quantity of work performed, and the periodical payments to be made, and the amount to be paid upon the final estimate when the work is completed. (2) It is ordinarily provided in most contracts that approximate estimates shall be made monthly, or at fixed periods, and that the company will make payments in accordance therewith as the work progresses, subject to adjustment upon the final estimate (3) But, unless so provided, a contract calling for monthly estimates imports an accurate measurement and final estimate for each month, and not one that is merely approximate. (4)

(1) *Ranger v. Great Western Ry. Co.*, 5 H. of L. Cas. 72; *Jones v. The Queen*, 7 Can. S. C. R. 570.

A clause, providing that the employer may determine the contract and forfeit the plant, etc., if the works are not proceeded with at the rate of progress required by the engineer, can, it would seem, only be put in force during the time limited for the completion of the work.

A provision authorizing the employer, in the event of default by the contractor to use the plant and materials, does not make the plant and materials the property of the employer. *Garrett v. Salisbury & Dorset Junct. Ry. Co.*, L. R., 2 Eq. 358. And where Government commissioners had the power, under the terms of a contract,—the work not having been completed within the time stipulated, or in accordance with the contract,—to take the contract out of the hands of the contractors and charge them with the extra cost of completing the same, the contractors' plant should not be forfeited, but should be returned to them in its then condition, or in such condition as it should be by a reasonable use and care of it during the progress of the work to completion. *Berlinguet v. The Queen*, 13 Can. S. C. R. 28.

Where a contractor fails to carry out the terms of the contract within the time stated therein, the company can hand the undertaking over to another, without incurring any responsibility toward the first contractor. *Stanton v. Can. Atl. Ry. Co.*, 21 R. L. 168 (Q. B.). Where a contract for the construction of part of a road stipulates that the price, at so much per foot, shall be payable monthly, according to the engineer's certificate, and no lump sum is stated for the whole work, the contractors can claim payment for their work and materials supplied, even where they have not completed the entire contract, if they have not been consulted as to the execution or resolution of the contract, or their permission has not been asked to have the work continued at their expense, but on the contrary the proprietor continued and completed the undertaking, and used the materials prepared by the contractor. *McGreevy v. Boomer*, 9 R. L. 587 (Q. B.). Affirmed by Supreme Court, *Cassell's Dig.*, 2nd Edit., p. 140.

(2) *Jones v. The Queen*, 7 S. C. R. 570; *McCarron v. McGreevy*, 13 S. C. R. 378; *Reg. v. McGreevy*, 18 S. C. R. 371; *Guilbault v. McGreevy*, 18 S. C. R. 609; *Peters v. The Quebec Harbor Commissioners*, 19 S. C. R. 685.

(3) *Ibid.*

(4) *Herrick v. Central Vermont Ry. Co.*, 27 Vt. 673.

Where the work is to be done to the satisfaction of the engineer, upon whose approval payment is to be made, the contractor can recover neither upon the contract nor in an action for work done until the engineer has certified his approval. (1) Where the certificate of the engineer as to the work done and the sums payable is to be final, it cannot be impeached, except on the ground of fraud, and no action can be maintained until the certificate is given. (2) If the engineer's certificate is made conclusive, it is binding on both parties to the contract, and no complaint can be made by the company for defects discovered after it has been given. (3) In cases where the person who is made sole judge of the performance of the contract is in the permanent employ of the company, it will be more difficult for the contractor to make out a case of unfairness, than in the case of a contract with a private person where an engineer or other professional man is employed simply for the particular work. In the former case the contractor has agreed to accept as judge a person whom he knows may be biased; in the latter case no such knowledge can be imputed to him. Thus where the person whose certificate is required is the engineer of the company, the fact that the engineer is also a shareholder in the company does not disqualify him. (4) On the other hand, when it is shown that the engineer is the agent of a private employer, and has entered into an agreement with him that the work shall be done for a certain sum, including his commission, this is sufficient fraud to entitle the contractor to disregard his decision. (5) A contract under seal between a company and a contractor to do certain works for a certain sum cannot be varied by a mere verbal agreement between the engineer of the company and the contractor. (6) Where the contract provides that no additions shall be made without a

(1) *Jones v. The Queen*, 7 S. C. R. 570; *McCarron v. McGreevy*, 13 S. C. R. 378; *Peters v. Quebec Harbor Commissioners*, 19 S. C. R. 685.

(2) *Ib.* and *Sharpe v. San Paulo Ry. Co.*, 8 Ch. 597; and see *Brown v. Allan*, Supreme Ct., 23 June, 1881, *Cassell's Digest*, 2nd Edit. p. 147.

(3) *Ib.* and *Dunaberg & Witpsk Ry. Co. v. Hopkins*, 36 L. T. N. S. 733.

(4) *Ranger v. Great West. Ry. Co.*, 5 H. L. Cas. 72.

(5) *Kimberly v. Dick*, 13 Eq. 1; *McIntosh v. Gt. W. Ry. Co.*, 2 H. & T. 250; *Waring v. Manchester, Sheffield & Lincoln Ry. Co.*, 7 II. 482, 2 II. & T. 239.

(6) *Sharp v. San Paulo Ry. Co.*, 8 Ch. 597.

written order from the employer's engineer, the engineer's certificate certifying that extra work has been done is not an order within the meaning of the contract. (1)

A provision in a contract, that no claim shall be made or allowed for extra work, "unless the same shall have been done in pursuance of written contracts or orders signed by the engineer," and that all claims for work done under such written contracts or orders shall be presented for settlement within a given time,—will bar a recovery for any extra work not supported by the directions, in writing, of the engineer, or presented for allowance within the time specified. (2)

This rule is not varied by the fact, that previous to doing the extra work, directed by the engineer, the contractors were assured by the local or assistant engineer, who communicated the direction from his chief, that they would receive extra compensation therefor;—it appearing that said assistant had no authority to bind the company by any such promise. (3) And this rule is all the stronger in the case of government contracts. (4) The power given to the engineer, to determine all points in dispute by his final certificate, does not give him the right to deduct any sum from the bulk sum contract price on account of an alleged difference between the quantity of work to be done, as stated in the specifications, and the quantity actually done. (5) The engineer's certificate must be obtained within a reasonable time, and where a contractor had not taken any steps to obtain it until six years after the superintendent had left his employer, the failure to produce such certificate was sufficient ground for dismissing his action. (6)

Construction
of particular
contracts—
evidence—
quality of
work—claim
for increased
price.

4. The plaintiffs, Barry & Smeaton, were sub-contractors for the mason work on a portion of the line of the Grand Trunk Railway Company, for constructing which Ross & McRae, the defendants, had the contract. In a conversation between the

(1) *Sulphur & Copper Co. v. McElroy*, 3 App. Cas. 1040.

(2) *Vanderwerker v. Vermont Cent. Ry. Co.*, 27 Vt. 130.

(3) *Vanderwerker v. Vermont Cent. Ry. Co.*, 27 Vt. 130.

(4) *Jones v. The Queen*, 7 S. C. R. 615; *The Queen v. McGreevy*, 18 S. C. R. 372.

(5) *Peters v. The Quebec Harbor Commissioners*, 19 S. C. R. 685.

(6) *McCarron v. McGreevy*, 13 S. C. R. 379.

plaintiff Smeaton and the defendant McRae, before the work was begun, Smeaton was given to understand that the standard of the second class masonry to be built by plaintiff was to be equal to that on the "Loop Line," another part of the Grand Trunk system, and shortly after McRae wrote to plaintiffs, instructing them to go on with the work "according to the plans and specifications furnished by the company."

The plaintiffs had completed a portion of their work, when they were informed by the engineer in charge that the quality of second class masonry was to be of a higher standard than they had supposed, which would increase the cost of construction from twenty-five to thirty per cent., whereupon they refused to proceed until McRae, who was present at the time, said to them, "go on and finish the work as you are told by the engineers, and you will be paid for it." They thereupon pulled down what was built, and proceeded according to the directions of the engineer. When the work was nearly done, McRae tried to withdraw his offer to pay the increased price, but renewed it on the sub-contractors threatening to stop. After completion of the work, payment of the extra price was refused. Upon an action therefor, it was held that the conversation between McRae and Smeaton prior to the commencement of the work, as detailed in the evidence, justified the sub-contractors in believing that the standard of quality was to be that of the Loop Line; that the promise to pay the increased price was in settlement of a *bona fide* dispute, which was a good consideration for such promise. (1)

5. H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditions, within four days, to provide two acceptable sureties, and deposit 5 per cent. of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed, and the contract was eventually given to other persons. In an action against H. on the bond it was held that the agreement made by the bond

Bond—condition—mutuality.

(1) Barry v. Ross, 19 S. C. R. 360.

was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into, H. was not liable on the bond. (1)

Evidence of
contract—
ratification—
Question for
the jury.

6. The plaintiffs entered into a contract with one F. to build a fence for a railway. F. controlled nine-tenths of the stock, and publicly appeared to be, and was understood to be, and acted as, managing director or manager of the company, although he was at one time contractor for the building of the whole road. Plaintiffs built the fence, and the railroad had the benefit thereof. The company repudiated the contract. In an action by the plaintiff to recover thereon, certain questions were submitted by the trial judge to the jury, who found that the plaintiffs, when they contracted, considered they were contracting with the company through F., and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments made were as money which the company owed, not money which they were paying to be charged to F., and a general verdict was found for the plaintiffs for the amount of the contract. The Supreme Court held (Ritchie, C. J., and Taschereau, J., dissenting), that it was properly left to the jury to decide whether the work performed, of which the railway company received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract; and that the verdict could not be set aside on the ground of being against the weight of evidence. (2)

Ratification of
contract—Re-
pudiation of
part.

7. The president of a railway company, purporting to act on behalf of the company, entered into a contract with certain contractors for the construction of forty miles of road. By the contract, bonds to double the amount of the moneys to be secured were to be deposited in a bank, to secure to the contractors payment of a portion of the price of the construction of the railroad. The president afterwards agreed that, in default of payment within a limited time, the contractors should take

(1) Brantford, Waterloo & Lake Erie Ry. Co. v. Huffman, 19 S. C. R. 336.

(2) Canada Central v. Murray, 8 S. C. R. 313.

the bonds in payment at fifty cents on the dollar. Two years after the bonds were delivered to the contractors, the company filed a bill repudiating the contract, and asking that the bonds be declared null and void. It appeared that the defendants had obtained a judgment at law against plaintiffs for a large amount on the contract, in which action the company had set up as a defence that the contractors had accepted the bonds in payment, that the plaintiffs had begun an action then pending on the contract against defendants, claiming damages for non-completion of work, that an Act of Parliament had been passed in the interest of the company, which recited the construction and completion of the work, and that during two years no steps had been taken to repudiate the contract or to question the president's authority, and that the company had taken possession of and the benefit of the work.

The Court held that the company must be taken to have ratified the contract, and that they could not take the benefit of a part of the contract and repudiate it as to another part. (1)

8. In an action where the plaintiffs alleged that they had agreed to complete the ballasting of a certain portion of defendant's railway, provided the company should furnish cash to meet the monthly estimates of the engineer, and that the plaintiffs had commenced, and were ready to complete the work, but defendants wrongfully prevented and discharged them, and it was pleaded in defence, that by the same agreement it was provided, that whereas plaintiffs had leased said railway from defendants, by lease bearing even date with the agreement, in which it was provided that £30,000 should be expended by defendants on the completion of the road before the rents should be payable, and whereas defendants were unable to raise the £30,000, it was therefore agreed that the plaintiffs should work the road, free of any charge for the use of it, and should expend the surplus earnings on the completion thereof, the amount so expended to be taken as part of the £30,000; that the lease so made was for the express purpose of enabling the plaintiffs to work the road, and raising thereby enough to enable defendants to pay them for the

Condition
precedent—
Independent
agreement.

(1) *Winnipeg & Hudson's Bay Ry. Co. v. Mann*, 7 Man. 81.

work contracted to be done by them ; that the plaintiffs, although they had the free use of the road, refused to work it, and abandoned the same, whereby they forfeited the contract, and defendants therefore prevented them from proceeding with the work ; it was held on demurrer that the plea was bad, the agreements being independent. (1)

Contractor
purchaser of
lands for con-
struction—
payment—re-
ceipt—title.

9. Where the contractor purchases in his own name the lands required for constructing the railway upon, and gives a clear receipt to the company for value received, for all materials supplied and work done for them, he must be presumed to have been paid the price of such lands ; he cannot therefore revendicate them, although he never gave the company any formal title for the lands. (2)

The title to land purchased by the contractors in the company's name for construction of the road is in the company. (3) And where the contractor acquires the land on his own account and in his own name, and the road has been constructed thereon, he cannot, in the case of a seizure against the company, be put in possession again without allowing the company or their creditors to withdraw the materials of the road, or himself paying their value, where such materials have been laid by his permission, and have been paid for partly out of the government subsidy and partly with the company's money and that of their creditors. (4)

But when the contractor purchases in his own name the lands on which the road is built, at his own expense, and when finished gives a clear receipt to the company for value received for all materials supplied to and work done for them, he is presumed to have been paid for the price of lands, and cannot revendicate them, although he never gave the company any formal title to them. (5)

Apportion-
ment—land
grant—sub-
sidy.

10. By contract embodied in a statute, the plaintiff company covenanted to complete a railway in five years, and thereafter

(1) *Tate v. Port Hope, etc., Ry. Co.*, 17 U. C. Q. B. 354.

(2) *Roberge v. North Shore Ry. Co.*, 34 L. C. J. 315 (Q. B.).

(3) *Banque d'Hochelaga v. M. P. & B. Ry. Co.*, M. L. R., 1 S. C. 150.

(4) *Banque d'Hochelaga v. M. P. & B. Ry. Co.*, confirmed in appeal, 19th Jan., 1884.

(5) *Roberge v. La Cie. du Ch. de Fer du Nord*, 34 L. C. J. 315.

to maintain and operate the same. In consideration thereof the Government covenanted: (1st) "to pay the company upon the construction and continuous operation of the line an annual subsidy for thirty-five years, such subsidy "to attach in proportionate parts, and form part of the assets of the company as and when each five-mile section is completed and operated;" (2nd) to grant to the company in fee simple 5000 acres of land for each one mile of railway completed, on completion of each section of five miles.

It appeared that the company completed a portion of the line, and received from the government, on completion of each five-mile section, the specified grant of land, and certain half-yearly payments in respect of the proportionate part of the subsidy which was deemed by the parties to attach thereto; thereafter the contract was broken by the company, and the government refused further payments. In a suit by the company and its assignees of a division of the railway and of the rights relating thereto, it was held, that on the true construction of the contract each claim to a grant of land was complete from the time when the section which had earned it was complete; that on the completion of each section a proportionate part of the subsidy became payable for the specified term, but subject to the condition of continuous efficient operation. (1)

11. The Court will not enforce specific performance of an executory contract involving continuous Acts. (2) Thus, specific performance of a contract to construct a railway entered into between a company and a contractor will not, as a rule, be enforced, the remedy by damages in such a case is complete. (3)

It is no answer, however, to an action for specific performance of an agreement to carry out certain works in a particular way, where damages are not an adequate compensation, that the public will be put to inconvenience by delay in the traffic while the works are being carried out. (4) Nor is it an answer in such a

(1) *Government of Newfoundland v. Newfoundland Ry. Co.*, 13 App. Cas. 199.

(2) *S. Wales Ry. Co. v. Wythes*, 1 K. & J. 186; *The Carleton Branch Ry. Co. v. The Grand Southern Co.*, 21 N. B. 340; and *Johnson v. Montreal, etc., Junction Ry. Co.*, 22 Grant Chy. 290.

(3) *Ib.*

(4) *Raphael v. Thames Valley Ry. Co., L. R.*, 2 Ch. 147.

case that the works agreed upon cannot be carried out without taking lands which the company have no power to take. The company will be directed to perform the agreement, and, if they fail to do so, they will be compelled to close their line. (1)

Liability of Company for Acts of Contractors.

The question of the nature and extent of the company's liability for the acts of contractors employed by them in the construction of the railway has already been touched upon. (2) But it may be further dwelt upon here with advantage. The company's liability would seem to depend upon (1^o) whether the act causing damage is a natural consequence of the work which the contractor is employed to do; (2^o) or, not being so, is the result of negligence on the part of the contractor or his servants, or of the doing of something outside of the contract, or which he was not called upon to perform; and (3^o) whether the employer exercised a direct control and supervision over the manner of the performance of the work causing the damage. In the first and third cases, if the facts establish the affirmative of the proposition, the company would be liable, in the second they would not. (3)

The following cases illustrate the various phases of the question. The leading case is that of *Ellis v. The Sheffield Gas Consumers' Co.*, (4) where Lord Campbell, C. J., thus expressed himself:

"I am clearly of opinion that if a contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself. I perfectly approve of the cases which have been cited. In those cases the contractor was employed to do a thing perfectly lawful, the relation of master and servant did not subsist between the employer and those actually doing the work, and therefore the employer was not liable for their negligence; he was not answerable for anything beyond what he employed the contractor to do, and that being lawful, he was not liable at all. But in the present case, the defendants had no right to break up the streets at all; they employed contractors

(1) *Atty Gen. v. Mid. Kent Ry. Co.*, L. R., 3 Ch. 100.

(2) *Supra*, pp. 30-32.

(3) *Supra*, pp. 30-32.

(4) 2 *Ellis & Bl.* 766.

to break up the streets, and in so doing, to heap up earth and stones so as to be a public nuisance, and it was in consequence of this being done by their orders that the plaintiff sustained damages. It would be monstrous if a party causing another to do a thing were exempt from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done," (1)

Again in *Bower v. Peate*, (2) Lord J. Cockburn, C. J., said :

"A man who orders a work to be executed,

from which in the natural course of things injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful." (3)

This statement of the law is, as observed by Lord Blackburn in *Hughes v. Percival*, (4) rather broadly put, and could not be universally applied, but would fit most cases of such a nature arising under railway contracts. The holding in the latter case was that the law casts a duty upon a person carrying on operations involving risk to others, to see that reasonable care and skill are exercised in those operations, and that such a person's responsibility could not be got rid of by delegating the performance to a third person. (5)

The rule was well put by Williams, J., in the case of *Pickard v. Smith*, (6) as follows : "Unquestionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants, in the course of his or their employment; consequently, if an independent contractor is employed

(1) 2 Ellis & Bl. at p. 769.

(2) L. R., 1 Q. B. D. 321.

(3) L. R., 1 Q. B. D. at p. 326.

(4) 8 App. Cas. 443.

(5) Ibid., and see *Barham v. Ipswich Dock Commrs.*, 54 L. T. 23.

(6) 10 C. B. (N. S.) 480; and see *Steel v. S. E. Ry. Co.*, 16 C. B. 550; *Reedie v. Lon. & N. W. Ry. Co.*, 4 Exch. 244; *Allen v. Hayward*, 7 Q. B. 960; *Mitchell v. Darley Main Colliery Co.*, L. R., 14 Q. B. D. 125.

to do a lawful act, and in the course of the work he, or his servants, commit some casual act of wrong, or negligence, the employer is not answerable.....

"That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by a parity of reasoning to cases in which the contractor is entrusted with the performance of the duty incumbent upon his employer, and neglects its fulfillment whereby an injury is occasioned."

The nature and extent of the control and superintendence which the employer exercises over the contractor is always a question of fact; and to entail liability upon the former must be shewn to have extended, not only over the general character of the work, but directly to the manner or method of the doing of the act causing the injury. (1) For instance, where a corporation employed a contractor to lay down sewer pipes in streets, and an employee of the contractor was killed by the caving in of the walls of a sewer owing to insufficient shoring, it was held that though the corporation exercised a general superintendence over the work through their inspector, they were not liable, as the evidence did not show that the corporation had by their inspector so interfered with the conduct of the work by the deceased as to assume personal control over him. (2)

Another forcible illustration is afforded by the case of *Kerr v. Atlantic & North West Ry. Co.* (3) There a contractor was employed to build a portion of the railway, at a fixed price of so much per yard for filling, excavations, etc., the work to be done under the superintendence of the company's engineers, in accordance with their directions, with the usual stipulations as to the right of the company to take away the work from the contractor, put on an extra force of men, etc. The contractor was to furnish all materials and plant, and was allowed no extra remuneration for long hauls; the company, however, were bound to furnish borrow-pits if required, and to exercise their statutory powers to expropriate land and rights of way for that purpose,

(1) *Supra*, pp. 30-32.

(2) *Murphy v. City of Ottawa*, 13 O. R. 334.

(3) Q. R., Q. B. (confirmed in the Supreme Court), Dec., 1895. Not yet reported in either Court.

if called upon by the contractor so to do. The contractor, by an independent agreement, obtained the right to excavate material from the land of a neighboring proprietor. In the course of excavation he destroyed a right of way to which the land excavated was subject in favor of the plaintiff, who sued the company in damages. The latter were held not liable, on the ground that they could exercise no control over the contractor as to the place where he chose to obtain his material or the manner of his obtaining it, but only as to the quality of the material supplied, and could not interfere to prevent him obtaining suitable material wherever he pleased.

The determination of the whole question seems to depend upon the application to the facts of each case of the maxim, "*qui facit per alium facit per se*." It has to be decided whether the person causing the damage is the agent, servant, or employee of another, or is one for whose acts that other is responsible. This is the law in Quebec; (1) and the commentators on the Code Napoléon in France make practically the same distinctions as we find in the English jurisprudence. With that exactness which characterizes the French text-writers, we find the distinction clearly drawn between the "proprietor" who engages a "contractor," and the "employer" (*commettant*) who hires a servant (*préposé*). Thus we find *Demolombe* (2) defining the last named as "Quiconque est employé par un autre à des soins, à des occupations, à des travaux intérieurs ou extérieurs, tel que commis, surveillant, ouvrier, voiturier, journalier, mécanicien, compagnon, tous ceux enfin qui se trouvent vers le commettant dans une situation subordonnée de ce genre."

And the same writer, after stating that the proprietor would not be a "*commettant*" according to the law, if he entrusted the execution of the works to the contractor "*à prix forfait*," without reserving any control, adds, that it would be otherwise if the person who has ordered the works has reserved to himself oversight and control, for, in such a case, he has taken the position of "*commettant*," and the contractor or workmen would become his "*préposé*." (3)

(1) C. C. 1054.

(2) Tome 31, No. 669.

(3) Tome 31, No. 623.

Dalloz adopts the same view, and states that the proprietor who reserves control and direction over the works which he has entrusted to the contractor is a "*commettant*," and, as such, responsible, under the article of the Code. He says:

"Mais la responsabilité à laquelle l'article 1394 soumet les commettants ne dépend pas de ce qu'ils ont choisi leurs préposés, mais suppose en outre qu'ils ont le droit de leur donner des ordres et des instructions sur la manière de remplir les fonctions auxquelles ils les emploient, autorité sans laquelle il n'y a pas de véritable commettant." (1)

Damage caused by Construction of Railway.

Interference
with ditches
and water-
courses.

1. It has been already pointed out that damages must be assessed, once for all, in respect of injuries which were foreseen or ought to have been foreseen as likely to result from the works of a railway company to lands taken or injuriously affected. If the damage that occurs is greater than was anticipated, no compensation can be subsequently claimed, nor can action be maintained in respect of it. (2)

This applies generally to cases of overflow of drains and water-courses. (3)

But the compensation awarded does not, in the absence of express agreement, include all contingent and possible damage which may arise from the construction of the works, but cannot be foreseen at the date of the award. (4)

The above statement of the law is, of course, based on the sup-

(1) *Dalloz* *vo.* Responsabilité, No. 611, Vide, *Manuel des Bâtiments*, Tome 1, p. 8; and pp. 352 and 367.

(2) *Supra* ch. 7, sec. 41; and see *Croft v. London & North-West Ry. Co.*, 3 B. & S. 436; *Todd v. Metropolitan District Ry. Co.*, 24 L.T. N.S. 435; *Chamberlain v. West of London & Crystal Palace Ry. Co.*, 2 B. & S. 617, 638.

(3) *Knapp v. The Great Western Ry. Co.*, 6 U. C. C. P. 187; *L'Esperance v. The Great Western Ry. Co.*, 14 U. C. Q. B. 187; *Vanhorn v. The Grand Trunk Ry. Co.*, 9 U. C. C. P. 264; *McGillivray v. Great Western Ry. Co.*, 25 U. C. R. 69; *Utter v. Great Western Ry. Co.*, 17 U. C. Q. B. 392; *Nichol v. The Canada Southern Ry. Co.*, 40 U. C. Q. B. 583; *Tolton v. Can. Pac. Ry.*, 22 O. R. 204; *Wallace v. The Grand Trunk Ry. Co.*, 16 U. C. Q. B. 551; *Crewson v. The Grand Trunk Ry. Co.*, 27 U. C. Q. B. 68.

(4) *Lawrence v. Great Northern Ry. Co.*, 16 Q. B. 643; *Lancashire & Yorkshire Ry. Co. v. Evans*, 15 Beav. 322.

position that the construction of the works is carried on in a lawful and proper manner, and not negligently.

2. By the common law, no rights can be claimed, *jure natura*, Surface water. in the flow of surface water, and its detention, expulsion or diversion is not an actionable injury, even when injury results to others. (1) A railway corporation duly authorized by law has no other or different rights regarding surface water or superficially percolating waters, and if its road-bed obstructs or diverts the natural flow of such waters, no right of action, by the common law, arises to adjoining owners of land, the presumption being that the damages to which they are entitled were included in the compensation assessed. (2)

But where the overflow is caused by a negligent or unlawful construction of the railway, recovery can be had by action at law and not by arbitration under the Act. If, on the other hand, the damage which has been sustained could have been foreseen, and is the natural and necessary result of the construction of the work authorized by statute, the remedy would be by arbitration under the Act. (3)

It is difficult to determine what constitutes under the Railway Acts an actionable negligence in such cases. In an Ontario case, where the plaintiff was allowed an action for damages against the company for obstructing the drainage of his land, such damages seem to have been allowed on the presumption that the company had, by the terms under which the lands were acquired, rendered it incumbent upon them to construct a culvert to carry away the accumulated or other waters, and that such culvert being insufficient for the purpose, its inefficiency was evidence of negligent construction. (4) The language used by Draper, C. J., in this case was as follows: "It must have been foreseen that the em-

(1) Gould on Waters, § 263.

(2) Walker v. Old Colony Railroad Co., 103 Mass. 10; Nichol v. The Canada Southern Ry. Co., 40 U. C. Q. B. 583; commenting on and distinguishing McGillivray v. Great Western Ry. Co., 25 U. C. Q. B. 69; Crewson v. The Grand Trunk Ry. Co., 27 U. C. Q. B. 68; L'Esperance v. Great Western Ry. Co., 14 U. C. Q. B. 173.

(3) Addison on Torts, 763; Simoneau v. The Queen, 2 Ex. (Can.) 39; Morin v. The Queen, 20 S. C. R. 515 (confirming 2 Ex. 390), and see Wallace v. G. T. R. Co., 16 U. C. Q. B. 551; Cameron v. Ont., Simcoe & Huron Ry. Co., 14 U. C. Q. B. 612.

(4) McGillivray v. The Great Western Ry. Co., 25 U. C. Q. B. at p. 74.

bankment, without any culvert, would prevent such natural or artificial drainage, and if the defendants acquired the land on which to place the embankment without condition or reservation of any kind, the decisions show this would have barred the plaintiff's claim. The defendants offer no evidence of the terms on which they acquired the lands, but we have the fact that they did construct a culvert, which, after the verdict, we must take to be insufficient; and we think we must also assume that in some way it had become obligatory on the defendants to construct it, and that the drainage of the lot was the object proposed; or it may be perhaps more properly stated, that preventing damage to the land, by stopping the escape of surface water, was the object and the duty cast on the defendants. The fact that the defendants have recently made another culvert in a different part of the embankment strengthens this conclusion." (1)

It will be noticed that the Railway Act does not provide for the case of surface water as it does for the restoration of water-courses or streams under section 91. The most that can be said in favor of the contention, that railway companies are to provide for the proper drainage of surface water, is to be found in section 92, where they are enjoined to do the necessary works with as little damage as possible.

This was the state of affairs that existed in the leading case of *Lawrence v. The Great Northern Railway Co.*, (2) the special statute governing the defendants in that case only requiring them to make openings when the railway crossed any public drains, embankments, or works made in any drainage district, but was silent as to flood waters.

The plaintiffs had already been compensated for *all injury and damage done* to the estate by *severance or otherwise*. The railway, constructed in conformity with its Act of Parliament, was carried along an embankment upon low lands lying between a river and plaintiff's land. The low lands were separated from plaintiff's land by a bank, which, before the railway embankment was placed there, was sufficient to protect his land from the flood-waters of the river; but, in consequence of the construc-

(1) *Ib.* p. 74.

(2) 16 Q. B. 643, 6 Eng. Ry. Cas. 495.

tion of the railway embankment, the flood-waters were unable to spread themselves over the low lands as formerly, and flowed over the bank on to his land. The Court held that as the company might, by proper precautions, have prevented the injury sustained by the plaintiff, an action on the case was maintainable; and the compensation previously had could not be held to embrace contingent and possible damages which might arise afterwards by the works of the company at *other places*, and which could not be foreseen by the arbitrator.

It is to be noticed, that the Court in this case also decided that the road was negligently constructed, because the company, by executing their works with proper precaution, might have avoided the injury to the plaintiff; and the want of such caution was sufficient to sustain the action. It was only on such grounds that the Court could have held that the remedy was by action, for had the company been acting lawfully in every respect, and not negligently, the remedy, if any, must have been by arbitration under the Railway Acts. (1)

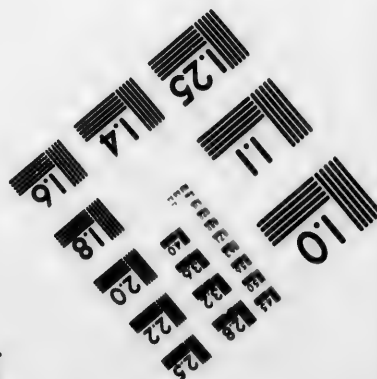
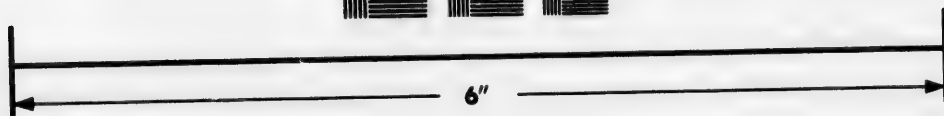
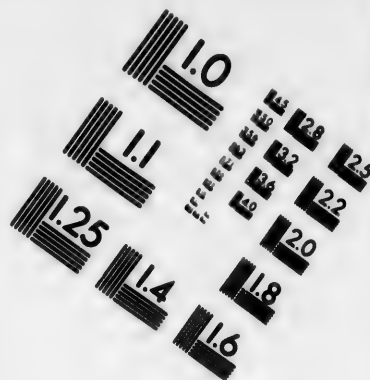
No doubt the above case was one where the method of constructing the road might be clearly said to be in derogation of the principles of the English Railway Act, and of section 92 of our Railway Act, which require that the company's powers shall be exercised so as to commit as little damage as possible. The company had clear notice of the flooding of the land by the presence of the embankment previously erected to exclude the waters from plaintiff's land, and would certainly know that the construction of their embankment would, without a proper outlet for the waters, unduly confine them. (2)

It is further pointed out in some of the Ontario cases, that one of the most important grounds of the above decision was that the damage complained of was occasioned by an act of the railway company at a place not on plaintiff's land, and with which the plaintiff had nothing to do, and was not concerned in (3) This is also the American doctrine: that damages esti-

(1) See judgment of Wilson, J., in *Nichol v. Canada Southern Ry. Co.*, 40 U. C. Q. B., at page 594.

(2) See also I. Redfield on Railways, § 82, s. 7.

(3) See judgment of Draper, C. J., in *Knapp v. The Great Western Ry. Co.*, 6 U. C. C. P., at p. 192; also of Burns, J., in *L'Esperance v. Great Western Ry. Co.*, 14 U. C. R., at p. 176.



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mated in the assessment are those resulting from the construction of the road on the land taken from the owner, but cannot include damages resulting from construction on the land of others. (1) When, however, the character and extent of a contingent future injury is capable of being ascertained, the amount of compensation should be ascertained once for all. (2) In Ontario it has been held that railway companies are not subject to the provisions of "The Ditches and Watercourses Act" (R. S. O., ch. 199, 1877); (3) and in any event, that such Acts could not be made applicable to railways under the jurisdiction of the Dominion Parliament. (4)

Quebec Law. **3.** By the law of Quebec, lands on a lower level are subject to receive such waters as flow naturally and without the agency of man, from those on a higher level, (5) and the owner of the lower land can do nothing to prevent this flow, nor can the owner of the higher level do anything to aggravate it. (6) If a railway company in that province does not use or exercise its powers in such a way as to drain the lands through which its railway runs as effectually as they had been drained by the old watercourses before the construction of the railway, it must make compensation or pay damages. (7) But when the injury occasioned to the plaintiff is one that could have been foreseen at the time when part of his farm was taken for the purposes of the railway, the company is discharged from making further compensation by the acquittance given to the company of all damages resulting from such expropriation. (8)

In a case where plaintiff's farm was at the bottom of a slope, and the railway ditches, which crossed his boundary ditches and those of the neighboring proprietors, collected the water for about a mile and a half, and discharged it upon his property, so

(1) Mills Eminent Domain, § 217.

(2) Croft v. London, etc., Ry. Co., 32 L. J. (Q. B.) 113.

(3) Miller v. G. T. R. Co., 45 U. C. Q. B. 222.

(4) Per Hagarty, C. J., at p. 225.

(5) C. C. 501.

(6) C. C. 502.

(7) Grand Trunk Ry. Co. v. Miville, 14 L. C. R. 469; Can. Pac. Ry. Co. v. Pichette, 31 L. C. J. 36 (Q. B.); Can. Pac. Ry. v. Landry, 11 R. L. 590.

(8) Simoneau v. The Queen, 2 Ex. (Can.) 391; Morin v. The Queen, 20 S. C. R. 515.

that, in consequence, he was obliged, either to suffer his land to be overflowed, or to accept the burden of maintaining ditches sufficient to carry off the water so collected and discharged; and the flooding did not occur until five or six years after the construction of the railway, and the flooding was not in consequence of any defect or want of repair in the railway ditches or culverts, but because the boundary ditches were not kept open and in good order; it was held that what had happened could have been foreseen, for it was obvious that the ditches on each side of the railway would collect water and discharge it in the manner mentioned. (1)

4. When the surface water is drained off land by means of artificial drains, the company are now bound, (sec. 91) upon acquiring lands for construction purposes, to restore such drains in the same manner as water-courses, properly so called, to their former usefulness. Any agreements, therefore, in regard to transfers of land to railway companies under the Railway Act will necessarily be made under the assumption that the company will not impair the drainage capacity of the remaining portion of land.

If, owing to the construction of the road, the remaining portion of land is flooded, by the inability of the surface water to find egress through the drains, then, if the construction was negligent in the light of sec. 91, compensation could be recovered in an action for damages against the company. (2) Where an injunction was taken to restrain a railway from interfering with the plaintiff's water power and his mills by constructing an embankment across his mill dam, it was held : that as the railway works were actually constructed before the writ was served, the injunction was not well taken, and that the plaintiff, having allowed the question of his alleged damage to be submitted to arbitration before serving his injunction, he thereby waived his right to an injunction. (3)

(1) *Id.*

(2) *Vanhorn v. The Grand Trunk Ry. Co.*, 18 U. C. R. 356; 9 U. C. C. P. 264; *McGillivray v. The Great Western Ry. Co.*, 25 U. C. Q. B. 69; *Moison v. The Great Western Ry. Co.*, 14 U. C. R. 109; *Carron v. The Great Western Ry. Co.*, 14 U. C. R. 102; *Addison on Torts* 763.

(3) Poudrette v. O. & O. Ry. Co., 11 L. N. 130.

Navigable
water.

5. In the erection of bridges the company are not to impede the free navigation of any river, stream or canal. (1) Before any bridge is built over navigable waters, the plan of the bridge and the proposed site of the work must be submitted to the Railway Committee for their approval. (2) The opening of swing bridges or draw bridges over rivers or canals is also subject to the regulation prescribed from time to time by the governor in council, (3) also the height of bridges above the surface of the water crossed. (4) The governor in council may also require the substitution of one form of bridge for another. (5)

Subsequent
purchaser
of land.

6. The subsequent purchaser of land adjoining a railway cannot recover for damages to such land arising by reason of the construction of the railway, where the former proprietor had been compensated for all damages occasioned thereto by the railway passing over and across his lands, (6) excepting when the injury is of an extraordinary or unusual nature. But it appears that where a railway company diverts a water-course without authority, and afterwards makes compensation therefor to the then owner of the land, the plaintiff's predecessor in title, the equitable easement thereby created in favor of the company is not valid against the registered deed of the plaintiff, a *bonâ fide* purchaser for value without actual notice; the diversion being wrongful as against the plaintiff. (7)

Duty of the
Crown.

7. The Crown is under no obligation to repair or keep open the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec. (8)

(1) Sec. 178.

In a case where the Corporation of Tingwick sued the G. T. Ry. Co. for damages caused to a bridge they had built over a river by the swelling of the river in consequence of defendants' bridge, it was *Held*: that damages were due, including the cost of rebuilding plaintiffs' bridge, but only such damages as were suffered within a year previous to date of action. *Corp. of Tingwick v. G. T. R. Co.*, 3 Q. L. R. 111 (Q. B. 1877).

(2) Sec. 181.

(3) Sec. 179.

(4) Sec. 179.

(5) Sec. 182.

(6) *Wallace v. The Grand Trunk Ry. Co.*, 16 U. C. R. 551; *Partidge v. The Great Western Ry. Co.*, 8 U. C. C. P. 97.

(7) *Tolton v. Can. Pac. Ry. Co.*, 22 O. R. 204.

(8) *Bertrand v. The Queen*, 2 Ex. (Can.) 285; *Simoneau v. The Queen*, 2 Ex. (Can.) 391; *Morin v. The Queen*, 2 Ex. (Can.) 396, 20 Can. S. C. R. 515.

Highways.

1. Sections 183 to 190 contain regulations affecting highway ^{Interference} crossings. By sec. 186 the inclination of the ascent or descent, with, as the case may be, of any approach by which any roadway is carried over or under the railway or across it at rail level, must not be greater than one foot of rise or fall for every twenty feet of the horizontal length of such approach, unless the Railway Committee directs otherwise.

The descent, even of the one foot in twenty, must be a gradual and not an abrupt one. Where the railway has excavated a portion of the highway for the purposes of the railway, leaving the railway at a certain point of the highway two feet six inches below its level, the company will be liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it. (1)

By the present Railway Act, the crossing of railways upon, along, or across streets or other public highways, is now under the jurisdiction of the Railway Committee.

The authority vested in the Railway Committee by sections 11 and 14 of the Act, with respect to highways and streets over and through lands of a railway company, can only be exercised upon an application or complaint made to it. In the absence of any complaint or application, the general power of a Municipal council, in the Province of Quebec, to order and lay out roads, is not restricted, and its proceedings are valid. (2)

Where a projected public road within a municipality runs across land of a railway company, it is necessary to obtain the consent of the railway company, or the authorization of the Railway Committee, to the laying out of such road, when the land intersected by the road is actually used or required for the working of the railway. (3)

Under the old Railway Acts, such jurisdiction belonged to the municipal authorities. In such cases it has been held that where a railway company constructed their railway along a highway in a municipality, the council whereof were not formally

(1) *Grand Trunk Ry. v. Sibbald*, 20 S. C. R. 259.

(2) *Corp. de St. Valentin v. Comeau*, Q. R., 3 Q. B. 104.

(3) *Ib.*; and see *Parish of St. Liboire v. G. T. R. Co.*, 16 L. C. R. 198.

applied to for leave, but subsequently passed a resolution notifying the railway company to fill up the ditch existing on both sides of the railway, and to put down proper crossings, the corporation had thereby admitted that the railway company were lawfully in occupation of the highway, and could not afterwards object. (1)

Also that the leave of the municipal authorities, required before a railway could be carried along an existing highway, may be granted at any time whether before, during, or after construction of the railway, and need not necessarily be given by by-law. And a Municipal Act, enacting that the powers of township councils shall be exercised by by-law, must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another legislature. (2)

The corporation having stood by while the railway was constructed, and subsequently for upwards of five years, while it was in operation, and having also, by resolution, procured further expenditure by the company, were held to be bound by acquiescence, and could not maintain an action for the removal of the railway from the street. A corporation may be bound by acquiescence as an individual may. (3)

The principle that the permission of the municipal authorities to a railway company, to build along and upon a street, and even occupy the whole of it, may be granted by mere resolution, or even inferred from their acts or acquiescence, and that such permission relieves the railway company from liability for obstructing the street, has been recognized in Ontario for many years. (4) And the Privy Council, in a recent Quebec case, (5) has refused to interfere with this judicial interpretation of a clause re-enacted time and again in the Railway Acts of this country. In the case referred to, the railway company occupied

(1) Corp. Township of Pembroke v. The Canada Central Ry. Co., 3 O. R. 503.

(2) Corp. Township of Pembroke v. The Canada Central Ry. Co., 3 O. R. 503.

(3) *Ib.*

(4) Regina v. G. T. R. Co., 15 U. C. Q. B. 121; *in re* Day and the Town of Guelph, 15 U. C. Q. B. 126.

(5) Atty. Genl. (Casgrain) v. Atl. & N. W. Ry. Co., 11 R. May (confirming the judgment of the Quebec Court of Appeals, Q. R. 2 Q. B. 305).

the whole of an alleged public street with their works. On a suit by the Attorney General at the instance of a private relator, to reopen the street, it was held that inasmuch as by plans, submitted to and approved by the Municipal Council, it was shewn that this street would be closed by the works, there was a virtual permission granted by the council to close the street, and that the company were acting within their powers, though not expressly authorized by either by-law or resolution to close the street.

The Courts have been frequently called upon to decide questions arising in actions of damages by proprietors whose property abutted upon streets or highways along which a railway was carried under this provision of the former Acts. In the case of *Lambert v. Corporation of Three Rivers*, (1) the Quebec Court of Appeals decided that where the works for the construction of a railway authorized by statute, passing in the street of a town, injure the property of an individual, his action for damages would lie against the railway company, and not against the corporation. In another case of the *City of Three Rivers v. Louis Lessard*, (2) the same court re-affirmed this principle, holding that a municipal corporation is not responsible for damages caused to a property by works constructed in a street by a railway company authorized by statute to make such works; and if the works cause damage, they should be claimed from the company and not from the corporation. Again, in a case of *Renaud v. City of Quebec*, (3) it was held that the location and construction of a railway, and the passage of its trains in one of the streets of Quebec, was a use to which the street had not been destined to be put, and that the corporation could not, without being authorized by a special act, permit such construction nor the passage of trains, and the corporation, by authorizing such construction and passage of trains, committed an illegal act, and rendered itself jointly and severally liable with the railway for damages to the abutting proprietors. This case could only be supported, on the ground that the city had not given the necessary permission as required by the statute (16 Vic., cap. 100). But

(1) 10 R. L. 359.

(2) 10 R. L. 441.

(3) 8 Q. L. R. 102. Reversed in Appeal. See Ramsay's Digest, p. 214.

in the Supreme Court, in the case of *Lefebvre v. City of Quebec*, (1) it was held that where the owner of several house abutting on a street, through which a railway was authorized to pass both by statute and resolution of the city council, took action against the city corporation for damages suffered on account of the construction and operation of the railway, the owner had no right of action against the corporation. The reasons given being that if the corporation gave the authority in compliance with the statute, there was a complete justification of the acts complained of. In that case, the corporation merely gave the railway company liberty to choose one of the streets in the town; and although they were subsequently informed of the choice made by the company, and asked to take steps to legalize the line, they took no further action. Under these circumstances, it was held that the recourse of the abutting proprietor, if any he had, was not against the city corporation, but against the railway company.

As has been already pointed out, the damages which a proprietor may recover from a railway company acting within its powers must be the result of a loss peculiar to himself, and differing in kind from that suffered by the community generally, and this principle has been applied to the case of loss or inconvenience suffered by a proprietor owning land abutting upon a street through which the railway has been permitted to run. In the case of *Brodeur v. the Corporation of Roxton Falls* and the *South Eastern Railway Company*, (2) it was held that in order to maintain an action of damages against a railway company because of the running of the railway over a public highway adjoining the residence of the plaintiff, and obstructing his egress and ingress, it is necessary for the plaintiff to prove that the immediate access to his premises is affected, and that he has sustained damages particular to himself and differing in kind from that of the public. That is to say, that if his access is not cut off by the railway, but that he merely suffered inconvenience not different in kind, though greater in degree, than other proprietors along the street, he would not be entitled to compensation. This principle was re-affirmed in the

(1) Cassel's Dig. 176.

(2) 11 R. L. 447.

case of *Whitfield* against the *A. & N. W. Railway*, (1) where the plaintiff, a proprietor of land abutting on a street in the town of Iberville, sought to restrain the railway company, by injunction, from constructing and operating its railway along the street in front of his property. The injunction was refused, upon the same ground as that stated in *Brodeur's* case, namely, that the damage which the plaintiff claimed to have suffered resulted from an inconvenience which was the same in kind as that suffered by the other proprietors along the street and the inhabitants of the town generally, and was not one which was a subject of compensation under the Act, and that therefore the railway company was not bound to pay compensation before proceeding with its work. (2) The case would be otherwise, had the railway company caused particular and special damage to the property of the proprietor, as was held by Privy Council in the town of *Parkdale v. West*, (3) where the railway company lowered the level of the street so as to immediately and directly affect the access to the plaintiff's property. In the *Brodeur* case, it was also held that the municipality, having tolerated the laying and using of the railway along the street in question, would be thereby estopped from urging that its construction and use was unauthorized by them.

Notwithstanding any liability which may be cast by statute upon a railway company, to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway (4) such highway is still a public highway, and as such comes within the provisions of a Municipal Act requiring every public road, street, bridge and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default by the liability, if any, of the railway company. (5)

Where a public road or highway is carried over the railway by a bridge, it has been held, and may be now considered as settled, that the railway company is bound to keep the roadway upon the bridge in repair, the roadway being considered as

(1) S. C. 1888, 33 L. C. J. 24.

(2) And see *Bourdon v. Bernard*, 15 L. C. J. 60 (Q. B. 1870).

(3) 12 App. Cas. 602.

(4) As to liability of Ry. Co., see *Fairbanks v. Great Western Ry. Co.*, 35 U. C. Q. B. 523, and *G. T. R. v. Godbout*, 6 Q. L. R. 63.

(5) *Mead v. Township of Etobicoke*, 18 O. R. 438.

part of the bridge which the railway company would be bound to keep in repair. This was held in England in the case of the *Lancashire & Yorkshire Ry. Co. v. The Mayor and Corporation of Bury*, (1) by the House of Lords confirming the decision of the Court of Appeal. Arguing from analogy, it would seem that if the highway were carried under the railway by means of a sub-way or tunnel, the portion of the roadway beneath the embankment of the railway would also have to be kept in repair by the railway company; and in either case, the railway company would be liable for any damage caused to any person using such roadway, on such bridge or in such tunnel, by reason of its not being in proper state of repair. The result of such a decision as that of the House of Lords in the *Lancashire & Yorkshire Ry. Co.* might be very far reaching. For instance, where a railway is carried for a considerable distance under the streets of a town, and the portions of the street thus tunneled under are supported by archways or bridges upon which the streets are supported, it might be a serious question as to whether the railway company would not be liable for any damage caused by these portions of the streets being out of repair, and whether there would not be an obligation upon them to keep these portions of the streets in proper order.

Where an act provides that the approaches for 100 feet to and next adjoining each end of all bridges shall be kept up and maintained, it was held, that the word "approaches" means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge and from the bridge on to the road, and does not include the highway to the distance of 100 feet from each end of the bridge, at all events, unless the artificial structures extend so far. (2)

The Act provides that the railway shall not be carried along an existing highway, but shall merely cross the same in the line of the railway, unless leave therefor has been obtained from the railway committee, and that no obstruction of such highway with the works shall be made without turning the

(1) 14 App. Cas. 417.

(2) *Traversy v. Gloucester*, 15 O. R. 214.

highway so as to leave an open and good passage for carriages, and on completion of the works, replacing the highway. (1)

It is evident that the provisions of this clause as to obstruction of "such highway" must refer to the case of the railway crossing a highway, and not being carried along it, by permission of the railway committee. For in certain cases, which may easily be imagined (and some have actually occurred), the construction of the railway along a highway would result in the complete or partial blocking of the highway, and even in its being entirely absorbed by the railway; which would, of course, make it impossible to "replace" the highway. This interpretation has been placed upon similar provisions of the previous Railway Acts, (2) which differed only from the present Act in that the leave of the proper local or municipal authority had to be obtained instead of that of the railway committee. From a very early period in the history of railway legislation in this country this interpretation has been adopted, (3) and the legislature, with a presumed knowledge of the judicial interpretation placed upon these provisions, has never altered their phraseology, except as above indicated, though frequently amending the Act in other respects. In a very recent case (4) the Privy Council refused to interfere with the judicial interpretation thus placed upon these clauses; and held that a railway company was acting within its powers in entirely closing a city street, by constructing its embankment along it with the permission of the city council.

This permission need not necessarily be by by-law, (5) nor even by formal resolution; it may be implied from the acts of the municipality, such as the approval of the railway company's plans, or allowing the works to be completed and used, without protest. (6)

(1) Sec. 183.

(2) R. S. C., cap. 109, s. 12; and acts consolidated thereby.

(3) *Regina v. G. T. R. Co.*, 15 U. C. Q. B. 121; *in re Day v. The Town of Guelph*, *ibid.* 126; and see *Howe v. The H. & N. W. Ry. Co.*, 3 Ont. A. R. 336.

(4) *Casgrain v. A. & N. W. Ry. Co.*, 11 R. May.

(5) *Regina v. G. T. R. Co.*, 15 U. C. Q. B. 121; *in re Day v. The Town of Guelph*, *ibid.* 126.

(6) *Casgrain v. A. & N. W. Ry. Co.*, 11 R. May.; *Pembroke v. Can. Central Ry. Co.*, 3 O. R. 503.

After completion of the work of crossing a highway, the same must be replaced, and no obstruction of the highway shall be made ; but so long as the rails do not rise above or sink below the line of the highway more than one inch, they are not deemed an obstruction. (1) If an accident occurs at the crossing by a runaway, and the wagon is broken at the crossing, if the rails protrude more than one inch, this is not *prima facie* evidence of negligence on the part of the railway company, but it is a question for the jury to determine whether such projection of the rails was the cause of the accident or not. (2)

The general principle to be applied to cases of railways constructed across or along highways is that the company is not liable so long as the railway is properly constructed in accordance with the provisions of the Act, and without negligence. This is the same principle which has been already frequently mentioned, and its application comes up in so many different cases and under such varied circumstances as to make it necessary to keep it always in mind. For instance, referring to the particular instance of a railway constructed along or across a highway, the damage caused to persons or vehicles by striking against the rails, and being upset or damaged thereby, would not be recoverable from a railway company, provided that the rails were laid in accordance with the provisions of the Act. This doctrine was recognized by the Quebec Court of Appeals, and confirmed by the Supreme Court, in a case of *Parker v. The Montreal Street Railway Co.* (3) where the driver of a vehicle was injured by the upsetting of his wagon in consequence of coming in contact with one of the rails laid by the company in one of the streets in Montreal. The charter of the company and the by-laws of the city authorized the railway to be laid with rails of a particular pattern, which were not to exceed the level of the street by more than one inch, and both Courts recognized the principle that if the rails had been laid in accordance with such by-law, the company would not be responsible for the damage resulting from the accident ; but the Supreme Court decided, as a matter of fact, that the rails had not been so laid, and that the

(1) Secs. 183, 184.

(2) *Thompson v. The Great Western Ry. Co.*, 24 U. C. C. P. 429.

(3) 7 L. N. 194, Cassel's Dig., p. 731.

weight of the evidence showed that the height of the rails exceeded the statutory limit.

Another application of this principle may be instanced. A street railway company was authorized to lay its track "along the highways in the parish of M." leading into the streets of the city. It was held, that the company in laying its track inconveniently close to the property on one side of the highway, and thus apparently favoring the property on the other side, had not exceeded its powers, and an action for the abatement of the nuisance was dismissed. (1)

In the line of a ditch formerly running at the side of the highway, and several feet within the limits of the highway, a railway company constructed an open culvert of square timber about five feet deep and seven feet wide. A person walking along the road fell into the culvert and was injured. The Court held, that the company were liable for not restoring the highway to its former state or in a sufficient manner not to impair its usefulness. (2)

Provisions are made by sections 185 and 186 as to the dimensions of bridges carrying the railway over highways and the inclination of the roadway beneath such bridges, and of the approaches, whether the roadway is carried over, across or under the railway, and as to the proportion of the cost of providing for the fencing of such approaches and bridges to be determined by the Railway Committee. (3)

2. In any event, the construction of the railway along or across any street is subject to the condition precedent of the company's submitting a plan and profile of the proposed construction for the approval of the Railway Committee. And in the case of railways constructed before the Act, the Committee may require

Approval of
Railway
Committee.

(1) *The Atty. Genl. v. The M. C. P. Ry. & The Trustees of M. Turnpike Roads*, 1 L. N. 580, S. C. Que., 1878.

(2) *Fairbanks v. Great Western Ry. Co.*, 35 U. C. Q. B. 523.

(3) Where a railway crosses a highway, and the road is carried over the railway by means of a bridge, the railway company are bound to keep in repair the roadway upon the bridge; such roadway being part of the bridge which the company are to maintain. *Lan. & Y. Railway Co. v. Mayor, etc.*, of Bury, 14 App. Cas. 417 (affirming the Court of Appeals); and see *Van Allen v. G. T. R. Co.*, 29 U. C. Q. B. 436.

See 235
252.

such plan and profile to be submitted within such time as they may direct. (1)

The Committee have power to determine the conditions upon which the construction of the works shall be permitted, or upon which the use of the works shall be continued in the case of existing railways, in order to remove or diminish the danger which might rise from the position of the railway with regard to the highway. (2) And the Committee may make such orders as they deem just and reasonable as to works and their execution, and the apportionment of the cost. (3)

These provisions would appear to apply only to highways existing at the time of the construction of the railway, and if any highway or street is afterwards opened by a municipality, which is intended to cross the line of the railway, special application would have to be made to the Railway Committee to decide the question as to whether the railway company were bound to make provision for such crossing either on the level or by means of a bridge or subway. The municipal corporation could not compel the railway company, except by order of the Railway Committee, to allow them to construct a road or highway across the railway, or any ditch or sewer, water, gas or other pipes. (4) Previous to the present Act, it would seem that no such works could be constructed across, over or through any lands of the Company. It was so decided in Quebec in the case of *The Corporation of the Parish of St. Liboire v. The Grand Trunk Railway Co.* (5) as long ago as 1865. There the municipality, after the railway had been constructed, opened a new road, and by their *procès-verbal*, provided that it should cross the railway at a certain point. On the company refusing to construct a bridge to carry the road across the railway, they took action to compel them to do so; it was held by the Court of Queen's Bench, confirming the judgment of the Court below, that the municipality had no right to impose on the railway any obligation of performing works in relation to public roads, independent of those required by the railway itself.

(1) Sec. 187.

(2) Ibid.

(3) sec. 188.

(4) sec. 11 (7).

(5) 16 L. C. R. 198, 1 L. C. L. J. 54.

3. The company are not necessarily guilty of a nuisance because their bridge, which connects two highways, is not of equal width with the street. (1) When the railway passes through a public highway by a cutting below the level, and the company fail to connect such highway by a bridge within a reasonable time, the remedy in such case is by indictment or information; an individual cannot maintain an action in such a case. (2) But where a corporation had, by their labor and capital, made a plank road, and were in consequence entitled under an Act of Parliament to receive tolls upon it, their interest in the road was held to be a peculiar one and distinct from the common interest which they would have in it as persons entitled to use it for the purpose of travelling, and they could therefore maintain an action of damages against a railway company for neglecting to make, within a reasonable time, a proper bridge over their railway where it crossed the plaintiff's road. (3)

4. Section 190 enjoins the erection of signboards at every highway crossed, and regulates the manner in which it shall be done. It has happened that horses becoming frightened at objects on the track have collided with these sign-posts and caused accidents. In such case the company are not liable, provided they place them in a reasonably proper manner, with a due regard to all the surrounding circumstances. (4) The posts would not necessarily be an indictable nuisance. (5)

Farm Crossings.

Under sec. 191 of the Act, railway companies are bound to construct farm crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles.

It was decided in the Quebec case of *The Grand Trunk Ry. Co. v. Huard*, in appeal, (6) that the Grand Trunk Railway Co. were

(1) *Reg. v. Great Western Railway Co.*, 12 U. C. Q. B. 250.

(2) *Ward v. Great Western Railway Co.*, 13 U. C. Q. B. 315.

(3) *Streetsville Plank Road Co. v. Hamilton & Toronto Railway Co.*, 13 U. C. Q. B. 600. *Hamilton & Brock Road Co. v. Great Western Railway Co.*, 17 U. C. Q. B. 567.

(4) *Soule v. G. T. R. Co.*, 21 U. C. C. P. 308.

(5) *Ibid.*

(6) *Q. R.*, 1 Q. B. 501.

governed, in the matter of crossings, by the Railway Clauses Act of 14 and 15 Vic., ch. 51, which was incorporated in its charter, 16 Vic., ch. 37, and that by that Act it was undoubtedly incumbent upon the company to construct farm crossings, the court deciding that such crossings must be made for each lot of land traversed, whether or not such lots were subdivisions of lands originally expropriated.

It was also there held that the compensation made at the time of the expropriation of the original lots of land could not be regarded as covering indemnity for lack of crossings upon future subdivisions of the lots. In the absence of an express agreement to that effect railway companies are not compelled to construct farm crossings unless required to do so by statute. (1) But it is now well settled that where the statutes, as in this country, provide for such crossings, the proprietor of lands severed by the railway is entitled to the necessary crossings reasonably sufficient for the beneficial enjoyment of his property, the nature and number of such crossings to be determined by the court or upon a reference. (2) But where the cost of a subway or undercrossing would be entirely disproportionate to its value and the value of the property, the company would not be compelled to construct. (3) The language of the present Act is different from that of the several Acts under which the cases of *Canada Southern Railway Company v. Clouse*, (4) *The Queen v. Vezina*, (5) and *Brown v. The Toronto & Nipissing Railway Company* (6) were decided; and the reasoning in those cases, as to the obligation of the railway company to construct crossings in the event of a future sub-division of the land after the construction of the railway, would hardly seem to apply to cases under the present Act. The decision in the case of *The Grand Trunk Ry. Co. v. Muir*, (7) recognizes the existence of such an obligation though

(1) See *DeBlois v. The Queen*, 1 P. E. I. Reports 434. Mills Em. Domain, § 213; *Vezina v. The Queen*, 17 S. C. R. 1.

(2) *Can. Southern Ry. Co. v. Clouse*, 13 S. C. R. 139; *Can. Southern Ry. Co. v. Erwin*, 13 S. C. R. 162.

(3) *Ibid.*

(4) *Supra.*

(5) 17 S. C. R. 1.

(6) 26 U. C. C. P. 206.

(7) Q. R., 1 Q. B. 501.

under another Act; as would also the decision in the *Canada Southern* case, (1) while *The Queen v. Vesina* would seem to deny it. But in the latter case the Court held that there was no statutory obligation to construct farm crossings over government railways. While an argument in favor of the latter view may be founded upon the use of the word "carried" in section 191, as implying the progress of construction of the railway across the lands, and that the obligation of the company being confined to making crossings for those persons only across whose lands the railway is carried, there is no such obligation towards a person acquiring land on both sides of the railway after it has been constructed, because the railway would not be carried over his land, yet the section seems equally susceptible of the more liberal and equitable construction that all persons whose lands are severed by the railway, whether acquiring the lands in their original state or as subdivided after the construction of the railway, should be entitled to such crossings as would enable them to have the beneficial enjoyment of their lands on both sides of the railway.

The question has given rise to much controversy in the United States, where, under the constitution, no person's property could be taken from him, except for purposes of public utility and upon payment of indemnity. (2) The latest decision holds that there is no "taking" in such a case, so as to bring it within the meaning of the constitution. (3) In the *Illinois Central Ry. Co. v. Willenborg*, (4) it was held that the statutory regulations in regard to fencing railway tracks, and the construction of farm crossings for the use of adjoining land owners, are police regulations, in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built as well as those thereafter constructed.

According to this holding, the Railway Act of 1888 would apply, in respect to the construction of crossings, to all railroads previously constructed, even to those which were previously not

(1) 13 S. C. R. 139, 162.

(2) Cf. *Que., C. C.* 407.

(3) *Chicago & N. W. Ry. Co. v. City of Chicago*; Supreme Court of Illinois, 1892; 24 *Chicago Legal News* 186.

(4) 117 Ill. 203.

required by their charters or general act to construct crossings. The Act of 1888 would in fact be retroactive.

In the Quebec statute the provision is that "farm crossings shall be made and maintained by the company upon the application of any owner of land, *present* or *future*, on each such land." (1) Patterson J. in *Vezina v. The Queen* characterizes this enactment as somewhat vague, and that the English version is not a very happy translation of the French. (2)

Where the company are bound to construct crossings, they must be made within a reasonable time after the commencement of construction at the point required, and during the period of construction. Where, during a period of two years, the company had failed to connect the severed portions of the plaintiffs' lands, it was held that the damages suffered by the latter in consequence could not be regarded as compensated for by the original indemnity which released the company of "all claims and demands whatsoever that they (the plaintiffs) might have against the said company for the loss of occupation of the premises in question, and generally of all rights and privileges resulting in their favor, with respect to the portion of said farm required by said company for their railway." (3)

But it would appear that in Quebec, at least, no damages could accrue where no time for constructing the crossing is mentioned in the deed of sale, until the company are put in default; and that when no damages are proved to have been suffered by plaintiff after the company has been put in default, an action of damages will be dismissed. (4) Where, however, the statute alone is relied upon for a crossing, it has been held in Ontario that the company are bound to construct it without unreasonable delay, and without request on the part of the owner. (5)

The land owner has not an arbitrary right to prescribe the place where the crossing is to be located, neither have the company an

(1) 43-44 Vic., ch. 43, s. 16.

(2) 17 S. C. R., p. 27. As to abandonment of right to a crossing by sale of land on one side of the railway, see *Midland Ry. v. Gribble*, 12 R., Nov. p. 37.

(3) *Smith v. Atl. & N. W. Ry. Co.*, M. L. R., 5 S. C. 149.

(4) *Crevier v. The Ontario & Quebec Ry. Co.*, 35 L. C. J. 58 In Ontario see *Shaver v. Great Western Ry. Co.*, 6 U. C. C. P. 321.

(5) *Burke v. The Grand Trunk Ry. Co.*, 6 U. C. C. P. 484.

arbitrary right to fix the place without any regard to its convenience or usefulness to the land owner. (1) The company are perhaps generally the best judges of the most suitable location for a crossing, for, as said by Jervis C. J., in *York & North Midland Ry. Co. v. The Queen*, (2) "By leaving the exercise of the powers to the option of the company, the legislature adopts the safest check upon abuse,—self-interest."

Farm crossings include passages across and upon the railway itself, a bridge over, or a tunnel under the railway; (3) unless the latter would be disproportionate in cost to the value of the lands. (4)

A mandamus will not lie to compel a railway company to perform a statutory obligation, such as the obligation to construct crossings, there being an adequate remedy by ordinary action. (5)

Bridges, Tunnels, Etc.

Sec. 192 regulates the headway to be maintained between the tops of freight cars and the overhead structure of bridges, tunnels, etc., through which the railway passes, viz., 7 ft. clear. And by sub-section 2, no higher cars are to be used until bridges are raised to correspond with the increased height of the cars. Where a railway company raise a municipal bridge passing over their railway and also the approaches thereto, as required to do by sub-section 4, of section 192, without obtaining the consent of the municipality or the owner, they are liable to the adjoining proprietor for the damage sustained by him by reason of the increased height of the highway as it approaches the bridge. (6)

The Governor in Council may exempt companies from the operation of this section (192) where air-brakes are used, or otherwise. (7) Trains may only run over a bridge, when such bridge is constructed and maintained with safe-guards approved

(1) *Burke v. G. T. R.*, 6 U. C. C. P. 488; *in re Reist v. Grand Trunk Ry. Co.*, 12 U. C. Q. B. 675; *ibid.* 6 U. C. C. P. 423.

(2) 1 E. & B. 865.

(3) *Burke v. G. T. R.*, 6 U. C. C. P. 488; *Reist v. G. T. R.*, *ib.* 423.

(4) *Canada Southern Ry. v. Clouse*, 13 S. C. R. 140.

(5) *Dubuc v. Montreal & Sorel Ry. Co.*, 7 L. N. 5; C. R. Que. 1883.

(6) *Hill v. G. T. R.*, 12 L. N. 57, S. C. Que. 1888.

(7) Sub-sec. 5.

by the Minister of Railways, (1) six months delay being given to conform to these requirements in the case of bridges already constructed. (2)

Where a railway company take over another railway under an agreement to be in force twenty-eight years, and at the time of taking over the latter is in default under section 193, and an accident happens, in consequence, to a conductor, the company operating the road over the leased line are not liable, as they are not the owners of the bridge causing the accident, (3) the statute enacting that "such bridge.....shall be constructed, reconstructed or repaired at the cost of the company, or of the municipality or other owner of the bridge." (4)

Trains must stop before passing a swing bridge. (5) And this section is amended by 55-56 Vic., c. 27, by making an exception in the case of interlocking switches at such bridges.

Fences and Cattles Guards.

The liability of a railway company to fence arises by statute only. There is no common law liability to fence, either as respects the highway or as respects adjoining proprietors. (6)

The obligation to fence the railway under the present Act is confined to the cases where the railway runs through a township, the municipal corporation for which has been duly organized, and which has been surveyed and subdivided into lots for settlement in whole or in part, with a proviso as to New Brunswick, Nova Scotia, and Prince Edward Island, for the protection of improved or occupied lots of land, wherever a county municipality has not been subdivided into local municipalities. (7)

There is a curious omission here as to the Province of Quebec, where there are many counties completely settled and organized which are not divided into townships, and where the municipal

(1) Sec. 193.

(2) Ibid.

(3) *McLauchlin v. Grand Trunk Ry. Co.*, 12 O. R. 418.

(4) Ry. Act, sec. 192, sub-sec. 3.

(5) Sec. 255.

(6) 1 Redfield, p. 491; *Pierce*, 401; *Wood*, p. 1543; *McMillan v. Man. & N. W. Ry. Co.*, 4 Man. 220; *Westbourne Cattle Company v. The Manitoba & N. W. Ry. Co.*, 6 Man. 553.

(7) Sec. 194.

laws clearly distinguish between a township and a parish municipality. The point was taken in a Quebec case, where the railway ran through a parish municipality in a county where there were no townships, that this section could not apply, and that the liability of the railway company for failure to fence must be governed by the provincial and municipal laws. But the courts refused to entertain the distinction sought to be made, and determined the company's liability under the section of the Dominion Act. (1) The whole section is loosely drawn, and unsatisfactory. Why the provision in favor of occupied or improved lands in counties where there are no local municipalities should be applicable to the Lower Provinces, and not to the other Provinces, is difficult to understand. Under the former Railway Acts the obligation to fence was dependent upon the company being required so to do by the proprietors of the adjoining lands, (2) but was not confined to lands in organized townships. And though the obligation may be considered broader in a way under the present Act, as being an obligation to fence off the railway, generally, as to the whole public, and not merely as to any adjoining proprietor who may demand the fence; yet it is not really so, as an adjoining proprietor, even of an improved and cultivated piece of land, is deprived of the right to have his property fenced from the railway, unless he resides in an organized township, or in the Lower Provinces.

The intention of the amendment to the Act was doubtless to widen the responsibility of railway companies in cases of cattle getting upon the track from adjoining lands, and being killed or injured by passing trains. But notwithstanding this amendment, and the amendments to the sub-sections governing the company's liability in such cases, the current of jurisprudence has been almost unchanged on this question, as will be seen on reference to the chapter on this question. (3)

The fences to be constructed must be of the height and strength of an ordinary division fence, (4) with gates, or bars, or

(1) *Campbell v. G. T. R. Co.*, Q.R. 3, Q.B. 570.

(2) R. S.C., cap. 109, sec. —.

(3) *Infra* p. 13.

(4) A fence composed of 4 strands of barbed wire only $3\frac{1}{2}$ feet high, with posts 12 to 14 feet apart, is insufficient. *Landry v. North Shore Ry. Co.*, 9 L. N. 5.

sliding or hurdle gates of sufficient width, with proper fastenings, at farm crossings, (1) and cattle guards at highway crossings, suitable and sufficient to prevent cattle and other animals from getting on the railway. (2)

Under section 197, as amended by 55-56 Vic., cap. 27, at every level crossing the fences on both sides of the crossing and of the track must be turned in to the cattle guards, so as to allow the safe passage of trains.

It has been held, under the Ontario statute, 46 Vic., c. 18, s. 490, sub-sections 15-16, which seemed to sanction barbed wire fences, and empowered municipalities to provide against injury resulting from them, that when constructed by a railway company upon an ordinary country road along the line of their railway, they could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind. (3)

The obligation to maintain fences on each side of the track involves the duty of a continuous watchful inspection, and the company must take notice of their state at all times. (4) They are not entitled to notice of their being out of repair. (5)

By section 198, gates at farm crossings are to be kept closed by the persons for whose use they are furnished. And section 199 provides penalties for wilfully leaving them open, or taking down any part of the fence; besides imposing liability for damages thereby caused. (6) But where the fastenings of such gates are deficient, and in consequence cattle stray on to the track and are killed, the plaintiff cannot be deemed to have adopted them as sufficient, by reason of his frequent use of them, (7) and section 198 does not render it any less the duty of the company to provide and maintain proper fastenings for gates, as

(1) Hurdle gates merely held in position by their own weight, without pins or other fastenings, are not in compliance with the statute. *Vernon v. G. T. R. Co.*, 9 L. N. 203; *M. L. R.*, 2 S. C. 181.

(2) Sec. 194.

(3) *Hillyard v. Grand Trunk Ry. Co.*, 8 O. R. 583.

(4) *Studer v. Buffalo & Lake Huron Ry. Co.*, 25 U. C. Q. B. 160.

(5) *Ibid.*

(6) Apart from this provision of the statute, see *Wood*, p. 1544; *Pierce*, 402; 1 *Redfield*, § 128; and *Rocheleau v. St. Lawrence & Atlantic Ry. Co.*, 2 L. C. R. 337.

(7) *McMichael v. Grand Trunk Ry. Co.*, 12 O. R. 547.

they are bound to do by section 194. (1) The company are only excepted from liability for accidents so long as the gates, having been properly constructed in the first place, are properly maintained. (2)

It would appear that section 198, when it applies, imposes no greater responsibility upon the land owners to keep the gates closed than in respect of their own use of them. (3) But where a proprietor allows a private road across his land, and the gate opening from it to the railway to be used by the public, he is responsible for the acts of persons using the road, and the railway company is not responsible for the killing of animals getting on to the railway through the gate being in bad condition owing to such bad use. (4)

Intersection of Railways.

By section 173 of the Act of 1888, the crossing of one railway by another can only be made with the approval of the Railway Committee, and this section has been amended by c. 27 of 56 Vic. to include street railways of all kinds. In other respects, such as ordering necessary apparatus to be adopted, (5) apportioning expenses of carrying out such orders, when the companies interested fail to agree (6) the Railway Committee have jurisdiction.

Section 257, requiring that an officer shall be stationed at every point where two railroads cross each other at rail line, has been amended by 56 Vic., c. 27, to provide for the case of street railways crossing the railway track, and in such case the conductor, before crossing, must go forward and ascertain whether the track to be crossed is clear.

All trains are to stop one minute before crossing the track of another railway, unless when at the crossing an interlocking switch and signal system or other device, which has the approval of the Railway Committee, is in use. (7)

(1) *McMichael v. Grand Trunk Ry. Co.*, 12 O. R. 547.

(2) Sec. 196.

(3) *McMichael v. G. T. R.*, 12 O. R., p. 556, opinion of Armour, J.

(4) *Jasmin v. C. P. Ry. Co.*, 6 L. N. 163.

(5) Sec. 175.

(6) Sec. 176.

(7) Sec. 258, amended by 56 Vic., cap. 27.

Where railways under provincial charters intersect with Dominion railways, such provincial railways are under Dominion jurisdiction in respect of all matters affecting such crossing or junction. (1) And by sec. 4 of The Railway Act, it is provided that all the provisions of the Act relating to railway crossings and junctions apply to all persons, companies and railways, whether otherwise within the legislative authority of Parliament or not.

Now, it will be noticed that section 3 of The Railway Act excepts government railways from its operation, but section 4 makes no such exception in regard to or mention of government railways; and it has been held in *Canadian Pacific Railway Company v. Northern Pacific & Manitoba Railway Company*, (2) that whether a provincial railway is constructed as a public provincial work, or as the work of an incorporated company, the Dominion Parliament has power to provide that such railway shall not cross or make a junction with a Dominion railway without first making application to the Railway Committee of the Privy Council of Canada. It is not sufficient merely to make the application, but the consent of the Railway Committee must also be obtained. (3)

It would appear that application must also be made to the Provincial Commissioner of Public Works as well as the Dominion Railway Committee. (4)

The decision of the Railway Committee upon all questions submitted to them under the Act is final (5), but they may review, or rescind, or vary any decision or order previously made. (6) Besides the means provided by way of penalty of enforcing their decisions or orders, it is provided by section 17 of the Act that any of their decisions or orders may be made an order of the Exchequer Court or of any Superior Court of the Provinces, and can be enforced as any rule or order of the Court could ordinarily be. In order to come to their decision, the Committee have power to make an inquiry and to enforce the attendance of wit-

(1) Sec. 177.

(2) 5 Man. 301.

(3) 5 Man. 301.

(4) *Credit Valley Ry. Co. v. Great Western Ry. Co.*, 25 Grant's Chy. 507; and see *Can. Pac. Ry. v. North. Pac. & Man. Ry. Co.*, 5 Man. at page 313-314.

(5) Sec. 21.

(6) Sec. 18.

nesses before them, and to compel them to give evidence and produce books, papers, etc.: (1) and the Committee or the Minister of Railways may appoint any person to make an inquiry and report upon any questions submitted to them, and the person so appointed, whether an engineer, commissioner or otherwise, has also the same power to compel the attendance of witnesses, and the giving of evidence, etc. (2) If the Committee think fit, they may, upon the request of any party upon security being given for costs, etc., state a case for the opinion of the Supreme Court, upon any question which the Committee may think involves a point of law. (3) And the Supreme Court is bound to determine any question of law so submitted, and give their opinion to the Committee. (4) While the decision of the Railway Committee is declared final, it is also provided by section 21, that any party aggrieved by any decision or order of the Committee may petition the Governor-in-Council, who may in his discretion rescind, change or vary such order as he deems just and proper. Although it is not likely that the whole council would, without grave cause being shown, advise the Governor to rescind an order of a Committee composed of certain of its members, still, no doubt the object of this provision of the Act is to give either party an opportunity of having the opinion of the whole of the Privy Council upon the questions submitted.

The right of reference to the Supreme Court on a question of law has very seldom been exercised; but one striking instance of it may be mentioned of the celebrated Manitoba Railway Crossings case. (5) There the Railway Commissioner of Manitoba was authorized by a local statute to construct a railway from Winnipeg northwards, crossing the main line of the C. P. Ry. The latter company contested the right to cross its railway, and on an application being made to the Railway Committee, the point was raised that such a line connecting with or crossing its main line could not be constructed under the Provincial Act, as it was a work under the exclusive jurisdiction of the Parlia-

(1) Sec. 13. (2) Secs. 12 and 13.

(3) Sec. 19. (4) Sec. 20.

(5) On an application by the Railway Commissioner of Manitoba, with reference to the Red River Valley Ry. Co., dated 10th Sept., 1888, Cassel's Dig. 487.

ment of Canada, and that the Act of the Legislature of Manitoba authorizing the construction of the local railway was unconstitutional. The Railway Committee granted a reference to the Supreme Court upon this question of law, and the Court gave the opinion that the Act of the local Legislature was constitutional, and within the powers of that body, and that the crossing could be legally made. As is usual on such reference, the Supreme Court gave no reasons for their opinion, and it is therefore impossible to say upon what grounds it was based ; but the question at issue was partly a constitutional one, and partly one depending upon the construction of the special Act incorporating the C. P. R. Co.

Prescription or Limitation of Actions.

There has been much controversy and divergence of opinion relative to sec. 287 of the Railway Act and corresponding sections of Provincial Acts. Under this section all actions or suits for indemnity for any damages or injury, sustained "by reason of the railway," must be commenced within one year next after the time when such supposed damage is sustained, or if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards. It also provides that the Company may plead the general issue, and give this Act, and the special Act, and the special matter in evidence at any trial to be had thereon, and may prove that the same was done in pursuance of and by the authority of the Act or of the special Act.

It has been urged on the one hand that the words of this section are so general in their terms as to include every species of damage or injury which might be caused either by the construction or the operation of the railway, and equally strenuously urged on the other hand, that the intention of the legislature was to confine the limitation to cases of damages or injury resulting from the construction of the railway itself, limiting the meaning of the words "by reason of the railway" to their narrowest sense,—that is to say, damages caused by reason of the railway and not by the running of the trains upon it. In Ontario, the wider interpretation has been adopted by the highest courts in

that province, and actions for injuries to person and property sustained as a result of the working of the railway have been held to be subject to the limitation imposed by this section ; while in the Province of Quebec the jurisprudence seems to be inclined in the opposite direction, namely, to confine the meaning of the section, and similar sections, to cases of damage caused by the railway itself,—that is, by the construction of the railway and works in connection therewith. (1) The latter view has been sustained in the Supreme Court, in the case of *McWillie v. The Grand Trunk Railway Co.*, (2) where, in an action taken against the company for damages caused to buildings by fire communicated by sparks from the locomotive, the company pleaded the statutory limitation, and it was held by the Quebec Court of Appeals, and maintained by the Supreme Court, that the limitation did not apply in such a case, the loss being caused by negligence in the operating and running of the trains, and the intention of the statute being to fix a limitation upon the company's liability only in case where the loss occurred by reason of the railway without negligence.

It was stated by Gwynne, J., in the last mentioned case, (3) that the language of the last part of the section shows that what is meant is damage done by the railway itself, and not by reason of the default or neglect of the company owning the railway, or of a company having running powers over it, by reason of insufficiency in the construction of the engines used, or of negligence in the manner of running them upon the railway.

The various holdings of the Ontario courts as well as some of the other provinces may be illustrated by the following cases :

The careless handling of machinery by railway servants, resulting in damage thereto, is not "damage or injury sustained by reason of the railway ;" (4) but injuries received through a collision are. (5) Any damage done through negligence upon

(1) *Marshall v. G. T. R. Co.*, 1 L. C. J. 6; *Boucherville v. G. T. R. Co.*, 1 L. C. J. 179; *Germain v. Montreal & New York Ry. Co.*, 6 L. C. R. 172; *Pigeon v. City of Montreal*, 9 L. C. R. 334, 3 L. C. J. 294; *Marche-terre v. O. & Q. Ry. Co.*, M. L. R., 4 S. C. 397.

(2) M. L. R., 5 Q. B. 122, 13 L. N. 217, 17 S. C. R. 511.

(3) 17 S. C. R., at p. 514.

(4) *Whitman v. Western Counties Ry. Co.*, 5 Russ. & Geld. 405, Nova Scotia, 1884.

(5) *Conger v. G. T. R.*, Com. Pleas. Div., 13 O. R. 160, 1887.

a railway in the carriage of passengers and the like is damage done "by reason of the railway." (1) Where defendants had negligently allowed dry wood to accumulate on the railway, which took fire from sparks dropped from defendants' locomotives, such was held to be damage sustained by reason of the railway. (2) Where the defendants neglected their statutory duty to construct fences, whereby cattle got on the line of their railway, and from thence on to the plaintiff's land, doing damage there, such damage was held to be damage by reason of the railway. (3) The railway limitation clauses do not apply to damages arising from the loss of baggage; they apply only to actions for damages occasioned by the company in the execution of the powers given, or assumed by them to be given, for enabling them to maintain their railway. (4) Where the plaintiff, who was lawfully on the street, was obliged, through the careless driving of a street car, to save himself by jumping into a drain, and was hurt; it was held, that the injury was sustained by "reason of the railway." (5) Such limitation clauses protect the railway company in an action for a collision at a railway crossing by which the plaintiff was injured, and which was caused by the neglect to ring the bell or sound the whistle on the locomotive. (6) Where a railroad company enter lands and cut down trees for the purpose of making their roadway, without previously assessing and paying compensation, they are not thereby barred from the protection of the limitation clause in the Railway Act. (7)

Since the decision of the McWillie case, however, it has been recently held by the Ontario Court of Appeal, (8) that where a person was killed by a fall from a bridge, part of a highway, which crossed the defendant's line, and had been negligently allowed by them to be out of repair, this was not "damage sus-

(1) *May v. O. & Q. Ry. Co.*, Q. B. D. 1885, 10 O. R. 70.

(2) *McCallum v. G. T. R.*, 31 U. C. Q. B. 527.

(3) *Brown v. G. T. R.*, 24 U. C. Q. B. 350.

(4) *Anderson v. C. P. R.*, 17 O. R. 747, confirmed in Appeal, 17 O. A. R. 480; *Roberts v. Great Western Ry. Co.*, 13 U. C. Q. B. 615, followed.

(5) *Kelly v. Ottawa Street Ry. Co.*, 3 O. A. R. 616 (1879). Following *Auger v. Ontario, etc., Ry. Co.*, 9 U. C. C. P. 164; *Brown v. Brockville & Ottawa Ry. Co.*, 20 U. C. Q. B. 202.

(6) *Id.* and see *May v. Ont. & Que. Ry. Co.*, 10 O. R. 70.

(7) *McArthur v. Northern Pacific Junction Ry. Co.*, 17 Ont. App. 86.

(8) *Zimmer v. Grand Trunk Ry. Co.*, 1892, 19 O. A. R. 693.

tained by reason of the railway," and that the limitation clauses of the Railway Act, sec. 287, did not apply.

The true view would seem to be that the limitation should only apply in cases where the damage is strictly by reason of the railway, within the literal meaning of those words; on the principle that all short limitations, being exceptions to the general or common law, should be interpreted strictly against those in whose favor they are made, and that in all cases of injury caused by negligence in the working or operation of the railway, the right to recover damages should be governed by the limitations or prescriptions established in ordinary cases of negligence.

As to continuation of damages, the Supreme Court has recently held, that where a railway company entered upon the land of an adjoining proprietor, and, by the making of excavations thereon, destroyed a right of way over the land in favor of a third party, the latter's right of action was extinguished by the lapse of one year from the date when the work of excavation ceased. (1) This decision would seem to conflict with previous holdings of the Ontario Courts in the cases of *The Township of Brock v. Toronto & Nipissing Railway Company*; (2) and *Beard v. Credit Valley Railway Company*; (3) where it was held, that a similar section of the Ontario Act did not apply to the case of a railway company wrongfully taking earth from the plaintiff's land.

Where there is a continuance of the act causing the damage, the courts in Ontario have held that the action can only be maintained for the damage accruing during the limited period previous to the institution of the action. (4)

(1) *Kerr v. A. & N. W. Ry. Co.*, Sup. Ct. 1895; and see *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127; *Knapp v. G. W. R. Co.*, 6 U. C. C. P. 187; and *Grenier v. City of Montreal*, 25 L. C. J. 138 (*contra*); *Renaud v. City of Quebec*, 8 Q. L. R. 102 (*contra*).

(2) 37 U. C. Q. B. 372.

(3) 9 O. R. 616.

(4) *Cameron v. Ont., Simcoe & Huron Ry. Co.*, 14 U. C. Q. B. 612; *Patterson v. G. W. R. Co.*, 8 U. C. C. P. 89; *Van Horne v. G. T. R. Co.*, 18 U. C. Q. B. 356; *McGillivray v. G. W. R. Co.*, 25 U. C. Q. B. 69; and in *Quebec*, see *Corp. of Tingwick v. G. T. R. Co.*, 3 Q. L. R. 111.

CHAPTER IX.

OPERATION OF THE RAILWAY.

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| 1. <i>Opening of the railway for traffic.</i> | 10. <i>Collection of tolls.</i> |
| 2. <i>Railway out of repair.</i> | 11. <i>Passengers—Payment of fare.</i> |
| 3. <i>Liability as carriers before opening.</i> | 12. <i>Ejectment for non-payment.</i> |
| 4. <i>Tolls.</i> | 13. <i>Tickets issued on conditions.</i> |
| 5. <i>Undue discrimination.</i> | 14. <i>Coupon tickets.</i> |
| 6. <i>Traffic arrangements.</i> | 15. <i>Jurisdiction and cause of action.</i> |
| 7. <i>Facilities to Express Companies.</i> | 16. <i>Measure of damages for ejectment.</i> |
| 8. <i>Tolls—Approval by Governor in Council.</i> | 17. <i>Enforcing payment of tolls for carriage of goods.</i> |
| 9. <i>Fractions of distance and weight.</i> | 18. <i>Obligation to carry.</i> |

Opening of
the railway
for traffic.

1. Before the railway can be opened for traffic, or for the public conveyance of passengers and goods, certain formalities are required to be observed under the Act. One month's notice in writing of the intention to open the railway for public traffic must be given to the Minister, and not until ten days after notice in writing is given of the time when the railway, or a portion of the railway, will be, in the opinion of the company, sufficiently completed for the safe conveyance of passengers and ready for inspection; (1) and the company is liable to a penalty of \$200 for every day within which the railway or any part of it remains open without such notice, and until the notices have been given and the time expired. (2)

On the receipt of the notice, the Minister of Railways is bound to direct one or more engineers to examine the railway and all its branches, culverts, tunnels and road crossings and its works generally, and also all its rolling stock and engines, and the Minister has power to stop or postpone the opening of the railway, according to the report of the inspecting engineer;—

1) Sec. 200.

2) Sec. 201.

that is to say, if, in his opinion, the opening of the railway would be attended with danger to the public, either by reason of the works being incomplete or the rolling stock and other establishment of the railway being insufficient,—this, however, only with the sanction of the Governor General in Council; and the postponement can only be for one month at a time, but may be postponed from time to time, according to the report of the engineer after further inspection. It is only after it is shown to the Minister that the opening of the road can take place without danger to the public that the railway can be opened for public traffic. (1) There is also a penalty of \$200 imposed on the railway company, in the case of their opening their railway for traffic contrary to the order of the Minister; (2) but this order is not binding on the company, unless a copy of the report of the inspecting engineer is delivered to them with the order. (3)

2. If any part of the railway is out of repair, such as any bridge or embankment, culvert or tunnel, or if any of the rolling stock is in such state as to be dangerous to the public, the Minister, on receipt of information to that effect, may appoint one or more engineers to examine the railway, or the part out of repair, or any of the rolling stock, etc., and upon his report, may condemn the railway, or the part complained of, or any of the rolling stock, and, with the approval of the Governor in Council, may order any change or alteration in any part of the railway or the substitution of a bridge or viaduct or tunnel, as the case may be, or any material for the roadbed; and the company must, after notice to that effect, make good any defects in their roadbed or in their rolling stock which has been so condemned, as required by the minister, (4) and these provisions with regard to the road being out of repair apply also to the state of repair in which any level highway crossing may be. (5) The minister has also power, as has the inspecting engineer, to regulate the speed of the trains, and the number of trains run on the railway, or any part of the railway, until such repairs have been made as he thinks prudent; and in default of complying with any order of the minister or inspecting engineer in that behalf, the company

(1) Sec. 202.

(2) Sec. 203.

(3) Sec. 204.

(4) Sec. 205.

(5) Secs. 206, 207, 208.

will incur for every act of non-compliance the penalty of \$2000. (1) And, in fact, the running of trains may be entirely prohibited over either the whole railway or any part of it, if the inspecting engineer thinks it would be dangerous to continue the running of trains, until such alterations or repairs are made, either in the road bed or the rolling stock ; and he may compel compliance on the part of the company by serving them with a notice in writing ; and in case of the company disregarding such notice, they are liable to a similar penalty of \$2000. (2) The Governor in Council, however, has always power to modify or disallow the order of the inspecting engineer. (3) These are the terms and conditions upon which a railway may be opened for traffic, and upon which its operation may be carried on, and the safety of the public in using the railway is protected by these provisions of the Act, so that no railway shall be open for traffic, nor, after being opened, shall be continued for traffic, without careful inspection by a Government engineer, and without the approval of the Governor in Council.

Liability as
carriers
before
opening.

3. And it may be well to point out here that until the railway is so open for public traffic, the company are not subject to the liabilities of common carriers, unless they have invited the public to travel on their road, or have held out their road as open for public traffic for the conveyance of either passengers or goods. It often happens that in the course of the construction of the railway, and before it is open for public traffic, certain persons are conveyed over the railway by the company on special terms. Such persons, however, cannot hold the railway company liable as common carriers, unless it is shown that the railway company have undertaken to carry the public generally or their goods. It was so held by Mr. Justice Davidson in charging the jury in the case of *Macrae v. The C. P. Ry. Co.*, (4) where the railway was not yet open for public traffic, but the company was in the habit of carrying certain classes of persons on certain special terms. The railway there was under construction, and trains were run not on any scheduled time, but for the convenience of the contractors and of the company itself, and by special per-

(1) Sec. 209.

(3) Sec. 211.

(2) Sec. 210.

(4) M. L. R., 4 Q. B. 191.

mission of the superintendent of construction individuals were allowed to pass up and down the railway, and even to have their goods carried on its trains. The plaintiff there had no such special permission to travel on the railway, and having been allowed by the conductor of a construction train to travel a certain distance, and being discovered on the train by the superintendent, was put off with his baggage upon the order of the superintendent, and the learned Judge charged the jury that in that case the railway company could not be looked upon as common carriers, and had the right to make such regulations as they chose with regard to the persons and goods that they would carry, and if they found that the railway was not open for public traffic, the plaintiff had no right as one of the public to travel upon the company's trains.

4. Supposing the railway to be open for public traffic, the company carry passengers and goods for a certain remuneration, which is called by the Act a toll. These tolls, in the absence of any special provision in the charter of the company, are fixed either by the by-laws of the company or by the directors, if authorized by the by-laws to do so. (1)

5. These tolls may be either for the whole extent of the railway, or for any part of it; but it is provided by the Act that they shall always under the same circumstances be charged equally to all persons, and at the same rate, whether per ton, per mile or otherwise, in respect of all passengers and goods and railway carriages of the same description, and conveyed or propelled by a like railway carriage or engine passing over the same portion of the line of railway; and also that no reduction or advance in the tolls shall be made, either directly or indirectly, in favor of or against any particular company or person travelling upon or using the railway. (2) The exact language of the Act is here

(1) Sec. 223.

At common law, a carrier was only bound to carry in accordance with his profession, and at reasonable rates. He was not bound to charge all his customers the same rate, as long as the rate charged was reasonable. The fact that in some cases a lower rate was charged was evidence that the higher rate was unreasonable, but it was not more than evidence. *Gt. West. Ry. Co. v. Sutton, L. R.*, 4 H. L. 226, 237; *Scott v. Midland Ry. Co. of Canada*, 33 U. C. Q. B. 580, 595.

(2) Sec. 224.

given, for this question of discrimination in tolls is a very difficult one. The evident object of the Act is to prevent the railway company from favoring any particular person or company in the rate of freight that may be charged for the carriage of their goods. It must be observed that to constitute a case of undue discrimination, the rate charged must be always under the same circumstances; and where the circumstances differ, there is no doubt that the railway company would have the right to charge a different rate, either for the carriage of goods or of persons. For instance, it is well known that railway companies have the right to charge different rates of fare in the case of an ordinary traveller making a single trip to one point, and in the case of a traveller making a return journey to the same point, and back again; and carrying the principle further, it is the invariable practice to allow a reduction in rate, or commutation, as it is called, in the case of travellers continuously using the same portion of the railway during certain seasons or throughout the whole year. The circumstances there differing, the company have the right to make a reduction in favor of persons who use that portion of the railway more frequently than others, in consideration of their paying in advance for a number of trips. Again, in the case of certain classes of travellers using the railway for the purposes of their trade or business, special rates are allowed them, under special conditions, limiting the liability of the railway company. These principles are recognized to some extent by sec. 225 of the Act, which says that the tolls fixed for large quantities or long distances may be proportionately less than the tolls fixed for small quantities and for short distances, if such tolls are under the same circumstances charged equally to all persons, that is to say, that the circumstances always being equal, no discrimination shall be made between the persons using the railway. There is a special provision of the same section, however, governing the quantity, namely, that in respect of quantity, no special toll or rate shall be fixed for any quantity less than one carload, or at least ten tons.

It is provided by sec. 232 that no discrimination between localities, which it is necessary to make in order to secure traffic on account of competition by rail or water, shall be deemed to be unjust or partial. It would appear, therefore, that the Act

provides that if there is a competition, either by rail or by water between two or more points on the railway, which does not exist with regard to other points, discrimination in tolls will be allowed, on the ground that the circumstances and conditions were not alike, with regard to other localities in which such competition did not exist. The company is specially prohibited from giving any secret special rate to any person, and in order to provide against this mode of discrimination, they are prohibited from giving any rebate, drawback or concession, and the companies are bound, on the demand of any other party, to make known any such special rate, rebate or concession given to anyone. (1)

As an illustration as to what would or would not constitute an undue discrimination by a railway company in favor of one individual as against another, the case of the *Denaby Colliery Co. v. The Manchester, etc., Ry. Co.* (2) should be carefully examined. This is a most instructive case, and deals with the whole question of the interpretation to be placed upon the clauses of the English acts which are analogous to our own. The decision of the House of Lords in this case would be binding upon the Courts in this country, in interpreting the similar clauses of our own act, (3) and it is therefore essential, in order to have a clear comprehension of the meaning and effect of these clauses, to carefully study this case. The points involved are too lengthy to be dealt with here in detail, but a short summary of the holding of the Court may be given. It was held in the first place that the fact that the railway company charged a less proportionate rate for coal carried for one colliery over a part of its line than that which it charged to another colliery for the carriage of coal over a shorter part of its line, did not constitute an undue advantage or preference to the first colliery company within the meaning of the Act, inasmuch as the goods did not pass "only over the same portion of the line of the railway." The language of the Act is that tolls shall always, under the same circumstances, be charged equally to all persons and at the same rate in respect of goods of the same description passing only over the same portion

(1) Sec. 233.

(2) 11 App. Cas. 97.

(3) *City Bank v. Barrow*, 5 App. Cas. 664; *Trimble v. Hill*, 5 App. Cas. 342.

of the line of railway. The House of Lords has authoritatively and finally decided in this case, that the conditions to constitute an undue advantage or discrimination must be strictly within the language of the Act; and that though for the same class of goods passing over the same portion of the railway, a higher rate of freight was charged in the case of goods carried only over that portion of the road than in the case of goods carried over a longer stretch of the road including that portion, this would not constitute a case of undue discrimination, inasmuch as the goods did not pass "only over the same portion of the railway." In the same case, however, their Lordships pointed out what would constitute an undue advantage of discrimination, and incidentally explained the meaning to be attached to the words "under the same circumstances." They held that where the railway company charged a less rate for coal carried only over the same portion of the railway, from the same point of departure to the same place of destination, in a case where it was to be shipped by sea to certain ports, than it charged in a case where it was not to be shipped to these ports, this was an undue discrimination; and they laid down the principle that where the same goods are carried only over the same portion of the line of the railway, the railway company are bound to charge the same rate of freight to all persons, without regard to the ultimate destination of the goods. In other words, in order to bring the Company within the meaning of the Act, the goods must be the same, and the portion of railway between the points of departure and destination must be the same; and the circumstance that certain of the goods are to be transhipped thence to other ports would not constitute an exception within the meaning of the Act.

Another important case, decided in England by the House of Lords, was that of *Evershed v. The North Western Ry. Co.* (1) This case arose under the English Act, 17-18 Vic., which contained provisions similar to our Railway Act, by which railway companies were forbidden to give any undue preference or advantage to any particular person or company in the matter of carrying or forwarding freight. The plaintiff had a brewery at a place where there were three other breweries. These latter were

(1) L. R., 2 Q. B. D. 254, 3 Q. B. D. 135, 3 App. Cas. 1059.

connected with the railway, whereas plaintiff's brewery was not. In order to get away some of the business of the three breweries from the Midland Railway, the North Western carried the goods of these three breweries to the freight depot, free of charge, and still made a profit on the whole transaction ; but they charged the plaintiff a rate of freight for the same service, that is to say, taking his goods from the brewery to the depot. It was held that this was an undue preference within the meaning of the Act, and that plaintiff was entitled to recover an amount equal to the cost of carting his goods to the depot.

In determining whether mileage rates charged to one trader on a lower scale than another do or do not amount to an undue preference, it has been held in England that the Court may take into consideration the fact that one of the traders has access to a competing line of railway. (1)

An agreement under which a railway company undertook not to allow any coal or coke to be received or deposited at or sent from one of their stations, either by railway or otherwise, which had not been raised from or manufactured at the collieries or coke ovens of a certain estate, was held to amount to an undue preference. (2)

It has been held by the Supreme Court of the United States, that it is no defence to a charge of discrimination that the discrimination was made in consideration of the person unduly favored releasing the company from claims for damages. (3)

6. Railway companies are not only bound to carry goods for the public generally, but they are also bound to give all reasonable facilities to any other railway company for the forwarding and delivery of traffic, and for the return of cars and trucks, etc. upon which goods or passengers may be carried, and are prohibited from giving any undue preference or advantage to any particular company or with regard to any particular description of traffic, and — *contra* from subjecting any particular company or person or description of traffic to any undue disadvantage ;

(1) *Phipps v. Lon & N. W. Ry. Co.* [1892], 2 Q. B. 229 ; 61 L. J. Q. B. 379 ; 8 Ry. & Can. Traff. Cases 83.

(2) *Rishton Local Board v. Lin. & York Ry. Co.*, 8 Ry. & Can. Traff. Cases 74.

(3) *Union Pacific Ry. Co. v. Goodridge*, 13 U. S. 970.

and special provision is made in the case where a company is working a railway which forms part of a continuous line, or which intersects any other railway, or which has any terminus, station or wharf near to a like place of accommodation of another railway. In such case, the company is bound to afford all reasonable facilities for forwarding by its railway all traffic coming from the other railway without unreasonable delay, and without giving any preference or advantage to any particular person, company or description of goods. And the company is bound in such case to offer no obstruction to the public desirous of using their railway as a continuous line of communication, so that all reasonable accommodation by means of the railways of the several companies may be afforded to the public. (1) Agreements may be made between railway companies, either in Canada or elsewhere, for the regulation and interchange of traffic between them, and even for a division or apportionment of tolls, commonly called a pooling of receipts, and in fact generally with regard to the management and working of connecting railways or of any parts of them; but this must not be for a term exceeding twenty-one years. Such agreements or arrangements, however, are subject to the consent of two-thirds of the stockholders of the contracting companies, and to the approval of the Governor-in-Council, (2) which approval can only be granted after two months previous notice of the application therefor has been published in the *Canada Gazette*, stating the time and place of the application, so that all persons interested may be heard for or against the arrangements. (3) But no such agreement, under sec. 240, can be made which contains any condition contrary to the provisions of that section with regard to the facilities to be afforded by one railway to another and to the public generally, which would violate those provisions with regard to undue preferences, etc.

It has been held that it was not sufficient that the directors of two railway companies communicated an agreement made between them as to traffic arrangements to their shareholders by writing, and announced it to them at a regular meeting of shareholders, who then had full notice thereof, and did not dissent therefrom,

(1) Sec. 240.

(2) Sec. 238.

(3) Sec. 239.

but ratified the same ; and though defendant's shareholders, at a regular meeting, approved of the sums found as balances struck in favor of the plaintiffs on the monthly settlements provided for in such agreement. (1)

It appears that two companies having the same termini may, in order to avoid competition, come to an agreement with reference to the traffic along existing routes on their lines, with a view to distribute such traffic and the revenue derived from it between the two companies. (2)

A traffic agreement to the following effect has been maintained and held valid and *intra vires* of a railway company ;—viz. an agreement that there should be certain joint rates chargeable to passengers and freight by a steamship company and a railway company, to be divided in certain proportions, and if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company ; and, on the other hand, if the steamship company received more than the sums mentioned in the agreement, the railway company were entitled to a share of the surplus. (3)

It was also held that sec. 240 does not prevent a railway company from guaranteeing all its traffic to a certain steamboat company, but that it only applies to railway companies. (4)

7. In addition to the provisions of the Act prohibiting undue preference being given to individual shippers or to other railway companies, it is provided by sec. 242 that where any company gives facilities to an express company, or to any persons carrying on that business, it is bound to grant equal facilities on the same

Facilities to
Express Com-
panies.

(1) *Great Western Ry. Co. v. G.T.R.*, 25 U. C. Q. B. 37 ; and see *Lindley Comp.* 181.

(2) *Hare v. L. & N. W. Ry. Co.*, 2 J. & H. 80 ; *Great Western Ry. Co. v. G. T. R.*, 25 U. C. Q. B. 37.

(3) *Owen Sound Ry. Co. v. C. P. R.*, 17 O. R. 691.

(4) *Owen Sound S. S. Co. v. C. P. R.*, 17 O. R. 697, *Rose, J.*, Confirmed in Appeal, 17 Ont. App. 482 ; and for recent English cases, see *Darlaston Local Board v. Lon. & N. W. Ry. Co.*, 9 R. 712 ; [1894] 2 Q. B. 694, 8 Ry. & Can. Traff. Cases 216 ; *Solway Junction Ry. Co. v. Caledonian Ry. Co.*, 8 Ry. & Can. Traff. Cases 177 ; *Dublin, Wicklow, &c., Ry. Co. v. Midland G. W. Ry. Co.*, 8 Ry. & Can. Traff. Cases 39 ; *City of Dublin Steam Packet Co. v. Midland G. W. Ry. Co.*, 8 Ry. & Can. Traff. Cases 1.

terms and conditions to any other express company which asks for them. It will be observed that this is only in the case where the company has already granted facilities on its line to some company or person carrying on the express business, and there is nothing in the Act which would prevent a railway company from carrying on the express business itself. In the United States, however, it has been held that a railway company cannot, either directly or indirectly, destroy or even trammel express enterprises, by either excluding express companies from its lines, or hindering them with unjust regulations or unfair discriminations, nor can it assume to itself the exclusive right of carrying on the express business over its own lines. (1)

In Canada, it would appear that railway companies may refuse to enter into any special agreement in the first instance with express companies, and if they thought proper could do the great bulk, if not all the express business themselves, so far as the receipt and delivery of goods and parcels, large or small, may be concerned. (2)

In the absence of collusion, the Court will not inquire into the reasonableness of the rates charged by a railway company to an express company. (3) The nature of the express business is such that it requires special accommodation for goods not to be treated as ordinary freight, but to be forwarded on fast trains with car accommodation to a named extent, and the ordinary statutory provisions as to equality cannot be applied. (4) It is absolutely necessary that a special bargain and contract has to be made, and no particular bargain can be forced by law on a railway company.

In the absence of legislation, it must be left to the company to decide whether they can provide any, and, if any, what accommodation for express business as distinct from the ordinary transmission of freight or passengers. When the railway company agree with the first comer, they are not bound to make their bargain in the anticipation that other companies will also apply. "It by no means follows," said Chief Justice Wait, of

(1) *Southern Express Co. v. Louisville & Nashville Ry. Co.*, 4 L. N. 16.

(2) *Vickers v. C. P. R.*, 13 Ont. App. 215, Hagarty, C. J. O.

(3) *Vickers v. C. P. R.*, 13 Ont. App. 210, Hagarty, C. J. O.

(4) *Vickers v. C. P. R.*, 13 Ont. App. 219, Hagarty, C. J. O.

the United States Supreme Court, "that because a railway company can serve one express company in one way, it can as well serve another company in the same way and still perform its obligations to the public in a satisfactory manner.....So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them." (1)

In this country, however, it has been held that a railway company having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, such agents having, as employees of the railway company, the right to use the company's trucks and baggage room as places for storing goods, and refused the same privilege to another incorporated express company, brought themselves within the provisions of the Act. (2)

All these questions are, however, within the jurisdiction of the Railway Committee; (3) and it has been held exclusively so. (4)

8. By sec. 226, the Governor in Council is given power to Tolls—Ap-
make some uniform classification of freight on the report of the Minister; and the company, in fixing or regulating its tolls, must conform to such classification, as he may from time to time prescribe, except in case of through traffic to or from the United States. All tolls are subject to the approval of the Governor in Council. The by-law fixing them must be approved by him, and they cannot be levied until after his approval, and two weeks publication in the *Canada Gazette* of the by-law and of the Order in Council approving of the tolls; and no company can collect any money for services as common carriers except subject to the provisions of the Act. (5) Under this section it has been held that where a company sought to escape liability for damage to goods through their negligence, on the ground that the shipper had agreed to relieve them of liability in consideration of his being charged the lower of two alternative freight rates, there was

(1) St. Louis, etc., R. R. Co. v. Southern Express Co., 117 U. S. 1.

(2) Vickers Express Co. v. C. P. R., 13 Ont. App. 210.

(3) Sec. 11 Ry. Act.

(4) Ontario Express and Transportation Co. v. G. T. R. Co. M. L. R. 7, S. C. 308 (S. C. 1891).

(5) Sec. 227.

no freight "lawfully payable" under sec. 246, inasmuch as no by-law fixing the rates had been approved by the Governor in Council, and, therefore, there was no valid alternative rate, and the release was inoperative. (1)

The Governor in Council has power also to revise the by-laws of the company, fixing the tolls, and, in case of revision by Order in Council, the tolls substituted by such order are the only ones which can be collected, after two publications in the *Canada Gazette*. (2)

Fractions of
distance and
weight.

9. With regard to the charging for tolls, it is provided by sec. 229 that any fraction in a distance under a mile is considered as a whole mile, and, as to any fraction of a ton in the weight of goods, a proportion of the toll is chargeable according to the number of quarters of a ton contained in the fraction, and the fraction of a quarter of a ton is considered as a whole quarter. (3)

Collection of
tolls.

10. The company are bound to post up in their offices in every place where tolls are to be collected, a printed list of the rates chargeable, whether for passengers or goods. (4)

These tolls are payable to such persons, and at such places near to the railway, and in such manner and under such regulations as the by-laws may direct. (5) As to passengers, the tolls are ordinarily collected by purchase of tickets at the station of the company from which the passenger takes his departure. It is frequently the practice that in the event of the passenger not buying a ticket before entering the train, he is liable to a further charge of ten cents. The right of the company to charge this may be doubted, and the practice in the United States is, perhaps, more legal and proper, namely, that a passenger buying his ticket on the train shall pay an extra ten cents, or some proportionate sum, which will be refunded to him on his producing the ticket or receipt of the conductor at his destination.

Passengers—
Payment of
fare.

11. It is usual that the passenger should purchase his ticket at the station, and the only means which the conductor of a train has

(1) Cobban v. C. P. Ry. Co., 26 O. R. 732.

(2) Sec. 228.

(3) See as to construction of similar clause of English Act, Pryce v. Monmouthshire Canal & Ry. Co., 4 App. Cas. 197.

(4) Sec. 230.

(5) Sec. 231.

for ascertaining whether a passenger has paid his fare or not is by the inspection of his ticket; but if a passenger has not purchased a ticket, he is bound to pay his fare to the conductor of the train, and if he refuses to pay his fare, he may be expelled from the train by the conductor and the train servants, with his baggage, either at any usual stopping place or station, or near any dwelling house, at the option of the conductor, who, however, must first stop the train, and who must not use any unnecessary force. (1)

12. There has been much litigation in connection with Ejectment for non-payment of fare, but it is unnecessary to refer here to more than some of the leading decisions of the courts on this point. Our Act has practically fixed the cases in which a passenger may be expelled. First, it is upon refusal to pay his fare. If the passenger has not bought a ticket, or has lost his ticket, it seems to be clear under the Act that he must pay his fare, or take the alternative of ejectment from the train, (2) though the right to eject has been denied in some cases where the passenger had bought a ticket and lost it. (3) If he states that he has purchased a ticket, and has mislaid it, he must be given a reasonable time within which to produce it; (4) but in all such cases, in the author's opinion, so long as the conductor acts within reason, the company could not be held liable in damages if the passenger was ejected for non-payment of his fare. The only means a conductor has of knowing whether the passenger has paid his fare at the station is by the production of the ticket, and so long as a reasonable time is given to the passenger to produce it, the company should not be held liable for damages, if the passenger is ejected from the train, even though he had actually paid his fare in the first instance at the station and obtained a ticket, for his ejectment

(1) Sec. 248.

(2) *Duke v. G. W. Ry. Co.*, 14 U. C. Q. B. 377; *Fulton v. G. T. Ry. Co.*, 17 Q. B. 428; *Curtis v. G. F. R. Co.*, 12 C. P. 89; *Perrault v. C. P. R. Co.*, 20 R. L. 321.

(3) *Dancey v. G. T. Ry. Co.*, 19 Ont. A. R. 664; *Beaver v. G. T. Ry. Co.*, 22 O. R. 667.

(4) *Curtis v. G. T. Ry. Co.*, 12 U. C. C. P. 89; *Fulton v. G. T. Ry. Co.*, 17 Q. B. 428; *Thomas v. Geldert*, 20 N. B. 95; *Perrault v. C. P. Ry. Co.*, 20 R. L. 321.

would be simply the result of his own carelessness in having lost or mislaid his ticket. It is the duty of the conductor to see that no person travels upon the train without having paid his fare, and so long as he acts without harshness and with reasonable discretion, there is no reason why the company should be held liable for the ejection of a passenger who is unable to produce his ticket, and refuses to pay the fare ; for it must be remembered that very often dishonest persons endeavor to ride free from one station to another of the railway, on the pretence of having lost their tickets.

But the conductor must always act without harshness and within reason. He must give the passenger ample time to find his ticket, if he claims that he has mislaid it ; and he must not eject him with any unnecessary violence, and he must not put him off the train except at a station or stopping place, or near some dwelling house. These principles were recently enforced in a case where a passenger who had purchased his ticket, but was unable to find it, was ejected at a point distant from either a station or dwelling house. (1) In all cases of this kind, the courts have been very jealous of the rights of the public as against the railway company ; but, at the same time, the passenger must always be in good faith and within his own rights.

The cases in which it has been held that a passenger could not be lawfully ejected from the train for non-payment of fare, where he had purchased a ticket but could not produce it, seem to have been decided upon the ground that there was no regulation or by-law of the company known to the passenger requiring him to produce his ticket on pain of expulsion, and that therefore it was no part of the contract of carriage that he should produce his ticket as a condition of being carried to his destination. For instance, in a recent case in Ontario, where a passenger had lost his ticket and there was no condition in his contract with the company, and no by-law or regulation of the company under sec. 214 requiring its production, it was held that he could not be treated as a passenger who refuses to pay his fare, and could

(1) *Perrault v. C. P. R. Co.*, 20 R. L. 321. The Court there held that the conductor was bound to take into consideration the age and feebleness of the passenger, and give him a proportionately longer time to find his ticket.

not lawfully be ejected from the train. (1) This case was decided mainly upon the English case of *Butler v. Manchester, Sheffield & Lancashire Ry.* (2) There the ticket issued to the plaintiff incorporated by reference a condition published in the defendants' time-tables, to the effect that every passenger should show and deliver up his ticket when required, and that any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket, should be required to pay fare from the station from which the train originally started. The plaintiff had bought his ticket, but lost it, and was therefore unable to produce it when required to do so by the guard. On being required to pay fare from the station from which the train originally started, he refused, and he was thereupon forcibly ejected from the carriage. He sued the company for assault, and it was held that the contract between him and the company did not by implication authorize them to remove him from the carriage, on his failing to produce a ticket and refusing to pay fare. This decision, it will be observed, was based upon a special contract, which provided that the passenger failing to produce his ticket should pay fare from the station whence the train had started, but the passenger did not contract that in event of his failure to do so, the company would have the right to eject him. It is difficult to conceive how this decision can be considered as affecting the right of railway companies to eject passengers under the provisions of the Railway Act in the absence of contract. (3)

The principle enunciated simply amounts to this, that a railway company has no right to eject a passenger for non-payment of an extra fare imposed by a by-law in default of the production of a ticket, unless the by-law, which constitutes the contract between the passenger and the company, provides for such ejection. The decision does not go so far as to say that the company must carry the passenger to his destination without payment of any fare. That would be contrary to the common law as to carriers, and in direct contravention of sec. 246 of our Railway Act, which makes the obligation to carry dependent

(1) *Beaver v. G. T. Ry. Co.*, 22 O. R. 667.

(2) L. R., 21 Q. B. D. 207.

(3) See *McCarthy v. Dublin, etc., Ry. Co.*, 18 W. R. 762. In Exch. Cham. where right to eject was maintained.

upon the "due payment of the fare lawfully payable therefor." If there is not a due payment of the fare, the company is not bound to carry the passenger; and it must follow as a logical consequence, apart from the provisions of sec. 248, that the officers in charge of the train have a right to refuse to carry him, and if he insists upon remaining on the train, to eject him. The passenger must either pay his fare to the officer in charge of the train, or show that he has already paid it to some authorized person; and the only recognized means of proving it is by the production of a ticket. If he cannot produce a ticket, the conductor has no possible means of knowing whether the fare has been paid or not; therefore he would be justified in insisting upon payment of the fare, and, in default, of refusing to carry the passenger further, and of ejecting him. And if the servant of the company would be justified in so doing, it is difficult to understand how the company could be held liable for his acts, especially as the passenger would himself be negligent in losing his ticket, and would have his recourse against the company to recover the amount of the fare, if he had paid twice. The American authorities all support the right to eject. (1)

Tickets issued on conditions. **13.** Again, the passenger must have paid his fare within the meaning of the Act. If a party purchases a ticket on certain conditions, he must comply with those conditions. For instance, if a ticket is declared to be good for a specified time only, the person buying such ticket enters into a special contract with the company, which is at an end as soon as the term has expired, and the

(1) *Chicago & Alton Ry. Co. v. Willard*, 31 Ill. App. R. 435; *Hibbard v. N. Y. & Erie Ry. Co.*, 15 N. Y. 455; *Crawford v. Cincinnati, &c., Ry. Co.*, 26 Ohio 580; *Shelton v. Lake Shore & Mich. Southern Ry. Co.*, 29 Ohio 214; *Louisville & Nashville Ry. Co. v. Fleming*, 18 Am. & Eng. Ry. Cases 347; *Frederick v. Marquette, &c., Ry. Co.*, 37 Mich. 342; *Jerome v. Smith*, 48 Vt. 230; *Haley v. Chicago & N. W. Ry. Co.*, 21 Iowa 15; *Townsend v. N. Y. Central Ry. Co.*, 56 N. Y. 295.

The decision in the case of *Beaver v. G. T. Ry. Co.* has now been reversed by the Supreme Court (22 S. C. R. 498), where it was held (Fournier J. dissenting) that the contract between the person buying a ticket and the company upon whose line it is intended to be used implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up, the company is not liable to an action for such ejectment. The *Manchester & Sheffield Railway* case was referred to and clearly distinguished (per Gwynne, J., at pp. 501-2).

holder of a return ticket attempting to return upon it after the expiration of the delay for which the contract was granted may be lawfully ejected from the train on refusal to pay his fare. (1)

Again, where the plaintiff had offered a return ticket, which, according to the terms printed upon it, had expired, and the jury had allowed him \$100 damages in an action for wrongful ejectment, the Court of Appeals of Quebec set aside the verdict, on the ground that the railway company were justified in putting the plaintiff off the train. (2)

Another case in which the same principle was maintained, that the passenger must conform himself to the conditions on which his ticket was sold to him, was that of *Livingston v. The G. T. Ry. Co.*, (3) where the Court of Review of Quebec held, in 1876, that where a passenger bought a ticket from Montreal to Toronto, marked good only for a continuous trip within two days from date, and stopped off for some days at Kingston, and afterwards attempted to continue his journey on the same ticket, the company had a right to eject him from the train in default of further payment of fare.

14. In the United States it has been held that where coupon tickets are issued by one company, giving right of passage over several distinct lines of railway, each coupon is a distinct ticket for each road; and a passenger holding such a ticket has the same rights against each company as if he had purchased a separate ticket for the portion of each roadway traversed; and that where the conductor on any one of the roads covered by the coupon tickets refuses to accept a ticket issued by the other company as agent for his line, and demands full fare, the passenger may, if his ticket was issued with authority, pay the fare over again, and recover from the company requiring payment as for breach of contract; or he may refuse to pay, and leave the train, and sue and recover all resulting damages; but if he refuses to leave the train, he cannot recover damages for being forcibly ejected by the conductor, where no more force is used than is

(1) *Reg. v. Phaneuf*, 5 L. C. J. 167; and see *Davis v. G. W. Ry. Co.*, 20 U. C. Q. B. 27.

(2) *Cunningham v. G. T. Ry. Co.*, 9 L. C. J. 57, 11 L. C. J. 167.

(3) 21 L. C. J. 13; and see *Craig v. G. W. Ry. Co.*, 24 U. C. Q. B. 504; and *Briggs v. G. T. Ry. Co.*, *ibid.* 510.

absolutely necessary, and the expulsion is not wanton or wilful. (1) It may be questioned whether the latter part of this holding is the good law in this country, as our Railway Act only gives the conductor to eject a passenger in the case of his not having paid his fare, and it would seem to be clear that if he had purchased coupon tickets from a company having authority to issue them, and giving him the right to travel over certain roads, he would have paid his fare, entitling him to travel over those roads, on production of his ticket, and could not be legally ejected from the train.

So it has been held in New Brunswick that, where these through tickets are issued in coupon form by mutual arrangement between various companies, the production by a passenger of a coupon authorizing him to pass over one of these companies' lines affords evidence of a contract between him and that company for his carriage as a passenger. (2) And if this be good law, the conductor would have no right to demand payment of fare.

Jurisdiction
and cause of
action.

15. In Quebec it has been held that a corporation, whose principal place of business is in a foreign country, may be served with process at any place in the Province of Quebec where it has an office for the transaction of business. So, where a foreign corporation had an office at Montreal for the sale of sleeping-car tickets, and the plaintiff, who had bought a ticket from defendants at New York, for a sleeping-car berth from that city to Montreal, brought an action of damages, alleging that he had been unlawfully expelled from the sleeping car, it was held that the service of his action at the office of the company in Montreal was a sufficient service to give the court at Montreal jurisdiction. Further, that although the expulsion took place beyond the province line, yet as it continued until the plaintiff reached Montreal (he being forced to ride in a first-class car), the cause of action arose within the province. (3) Where a person having a return ticket for a passage from one place to another is put off the train at an intermediate point, the cause of action arises at this latter place, and not where the ticket is issued. (4)

(1) Penn. Ry. Co. v. Cornell, 127 Ill. 419.

(2) Macdonald v. The Mayor of St. John, 25 N. B. 318.

(3) New York Central Sleeping Car Co. v. Donovan, M. L. R., 4 Q. B.

392.

(4) Ralph v. Great Western Ry. Co., 14 Can. L. J. N. S. 172.

16. While the general rule, that damages will only be allowed when they are the direct and natural result of the company's acts, and which could have been reasonably foreseen at the time, and that remote damages will not be allowed, (1) has been generally applied to cases of ejectment from a train, (2) there is always difficulty in determining, upon the facts of each particular case, what damages should be allowed, or refused as too remote. In a very recent case (3) the Supreme Court, confirming judgments of the Ontario Court of Appeal (4) and of the Divisional Court, (5) held that illness resulting from exposure to cold, in consequence of ejectment from a street car, is not too remote a cause for damages; and that where the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car, and therefore liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis, which ensued, was the natural and probable result of the ejectment, and in awarding damages therefor. This case would seem to go very far, and to be in conflict with the principles laid down in *Hobbs v. London & S. W. Ry. Co.*, (6) upon which case one of their Lordships, and the Chief Justice of the Court of Appeal (Hagarty, C. J.) based their dissent.

17. In the case of non-payment of tolls, they may be recovered by an ordinary suit, in any Court of competent jurisdiction, and in the case of goods, they may be detained until payment of tolls. (7) In such case, the goods remain at the risk of the owner, goods.

(1) Pothier, Obligations, Nos. 159, et seq.; 1 Sedgwick on Measure of Damages, 67; C. C. 1074; Victorian Ry. Comrs. v. Coultas, 13 App. Cas. 222; Rock v. Denis, M. L. R., 4 S. C. 134, 356; Thibaudeau v. Montl. Street Ry. Co., ibid., 400; Toms v. Corpom. of Township of Whitby, 35 U. C. Q. B. 195; Ferrie v. G. W. Ry. Co., 15 U. C. Q. B. 513.

(2) Williamson v. G. T. Ry. Co., 17 U. C. C. P. 615; Hobbs v. Lon. & S. W. Ry. Co., L. R., 10 Q. B. 111; Goff v. Gt. Northern Railway Co., 30 L. J. Q. B. 148.

(3) Toronto Ry. Co. v. Grinstead, 24 S. C. R. 570.

(4) 24 O. R. 683.

(5) 21 Ont. A. R. 578.

(6) *Supra*.

(7) Sec. 234. In a case where plaintiff contracted with defendants to have his goods carried by their line, and through the intermediary of another line with which he had a contract for a low rate, to his destination, and the defendants failed to send the goods by that other line, thereby causing plaintiff to pay a higher freight, the defendants pleaded the illegality of the low rate contract, but it was held that the contract could not be assumed to be illegal, for even if it could not be enforced by plaintiff against the intervening company, this would be no defence to the defendants. (*Langdon v. Robertson*, 13 O. R. 497.)

(1) and if the tolls are not paid within six weeks, the company may sell the goods and retain the tolls, and all expenses and charges out of the proceeds, but are bound to deliver the surplus or any part of the goods which are not sold, to the owner.

(2) In the case of goods remaining unclaimed for a year or more, the company can sell them, by giving public notice for six weeks in the *Official Gazette* and in any local papers that it thinks proper, and out of the proceeds they may retain any freight due on the goods or charges or expenses in connection therewith; and if there is any balance remaining, they shall keep the same for a period of three months, to be paid over to any person entitled thereto; (3) and if this balance is not claimed in that time, it is to be paid over to the Receiver-General, for the public uses of the country until claimed by the owner. (4)

This right of retention or lien upon goods for freight has always been recognized by the law in favor of carriers. From the language of the Act, it is evident that this right of lien or privilege upon the goods for the payment of freight exists upon any part of the goods for the whole amount of freight due for the carriage of the whole,—that is to say, that the company's lien is not a proportionate one, equivalent to the amount of freight due upon such part of the goods as may remain in their possession, but they may hold any of the goods which remain in their possession for the full amount of freight due by the owner of the whole quantity carried. This is in accordance with the common law with regard to carriers, and has been recognized in one of the early cases in the province of Quebec, (5) where it was held that a common carrier has a privilege upon every portion of the goods carried for the payment of the whole freight due by the owner or consignee of the goods, and this principle was reaffirmed in the late case of the *Great Western Railway Company v. Crawford*, (6) where the consignee of rails carried by the railway company contended, that without a special contract, the company could not have a lien beyond what was due on the particular rails detained, the company having delivered the greater part of the consign-

(1) Sec. 234.

(2) Sec. 235.

(3) Sec. 236.

(4) Sec. 237.

(5) *Brewster v. Hooker*, 7 L. C. R. 55, 1 L. C. J. 90.

(6) 6 Q. L. R. 160.

ment. It was held that the company had a lien upon the portion of the goods in their possession for the general balance of freight due on the whole cargo, as well as for the charges upon the particular goods retained.

The right of the company to recover freight as common carriers may be enforced against both the shipper and the consignee who takes delivery of the goods; and the goods may be retained until payment of freight as against the consignee, unless he is relieved by special contract.

To create a valid lien, it is essential that the party through whom it is acquired should himself either have the absolute ownership of the property, or at least a right to vest it; there must also be an actual or constructive possession by the party asserting it, with the express or implied assent of the party against whom it is asserted. (1) Where the consignor's contract is made with the first carrier alone for the whole distance, all succeeding carriers are the agents of the first carrier, and there is no priority between them and the consignor or consignee. Where the freight is paid in advance to the first carrier, the last carriers cannot claim a lien on the goods for advance charges paid by them to intermediate carriers from whom they had received them and for freight for carriage by their own line. But where the freight is not paid in advance, the last carrier may, as agent for the first with whom the contract was made, collect the whole freight, and assert a lien on the goods, but not for a sum beyond that contracted for by the first carrier. (2)

In a New Brunswick case, which came up under the Government Railway Act, (3) the goods had been replevied, and the freight agent put in a special claim. It was contended by counsel for plaintiff that the property of the Intercolonial being in the Crown, the claim for lien should have been made in the name of the Queen or of the superintendent of the railway; that the defendant had no property in the goods; that he should have specified the nature of the claim; that the claim, being a personal claim he had no right to show a lien in any other person. But

(1) *Trottier v. Red River Transportation Co.*, Man. Rep. Temp. Wood at p. 262; and see *Leaf v. Can. Shipping Co.*, 1 L. N. 220.

(2) *Ib.* p. 255; *Fitch v. Newberry*, 1 Douglas (Mich.) 1.

(3) R. S. C., p. 581, sec. 33.

it was held that none of these objections were sustainable; that the agent under the section of the Act had a special property in the goods, and that under Consol. Stats. N.B., chap. 37, sec. 203, the agent could claim a special property in the goods, without giving further particulars. (1)

At common law a carrier has no lien upon goods for a general balance of account more than in other cases of lien, and such liens are not favored. (2)

The consignee may be held liable not only for freight on the goods, but for demurrage and other like charges, provided that it is so specified in the bill of lading, and he claims delivery under such bill of lading. If he presents the bill of lading and asks delivery of the goods, he is bound to pay the freight due thereon before obtaining delivery; and if the bill of lading provides for the payment of demurrage, he would have to pay such demurrage, if due, in addition to the freight, and the railway company would have a lien for the payment of such demurrage, as well as for the payment of freight. This has been held in many cases of carriers by water, and also in the case of railway companies. (3) This lien only exists so long as the goods are not delivered. If the railway company delivers the goods, it loses its privilege or lien thereon, and has only its recourse against the consignee or shipper personally; but the unloading of the goods upon a platform, or the putting them into a warehouse, to await their being taken delivery of by the consignee would not destroy the company's lien. So long as the goods remain in the possession of the company, the lien continues to exist. (4)

Obligation to
carry.

18. It is provided by sec. 246, that all regular trains shall be started and run as nearly as practicable at regular hours fixed by public notice, and the company is bound to furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous to the hour fixed offered for transportation at the place of starting, stations and usual stopping places; and the company is bound to take

(1) *Rowe v. McEwen*, 28 N. B. 86.

(2) *Rushforth v. Hadfield*, 6 East 519; *Redfield*, Vol. 2, § 188, No. 27.

(3) *Murray v. G. T. R. Co.*, 5 R. L. 746.

(4) *Groulx v. Wilson*, Q. R., 1 S. C. 546; *Patterson v. Davidson*, 2 Rev. de Leg. 77.

and carry such passengers or goods on the payment of tolls lawfully payable therefor, (1) and duly deliver them at the place of destination; and in the case of neglect or refusal by the company either to receive or carry to their destination such passengers or goods, an action lies by the person aggrieved, and the company is not relieved from its liability by any notices or conditions, if the damage complained of is the result of negligence or omission on its part or that of its servants. As a qualification to these provisions of the Act, we must read those contained in secs. 253 and 254, which provide in effect that the company is not bound to carry goods which, in its judgment, are of a dangerous character, such as gun-powder, nitro-glycerine, vitriol, and articles of a similar nature, and the company has the power to open any packages suspected to contain such dangerous articles, and if it elects to carry them, the company is bound to put them in cars specially set aside for that purpose, which cars must have the words "dangerous explosives" plainly appearing in large letters on both sides, and the company is liable to a penalty of \$500 for neglect to comply with this provision of the Act. On the other hand, any person sending such goods by the railway must distinctly mark their nature on the outside of the package, or otherwise give notice in writing to the station-master or the employee of the company with whom they are left; and there is a like penalty of \$500 for sending such goods without giving such notice. This exception with regard to dangerous goods provides the only case in which the company can refuse to carry any particular class of goods. With this exception they are bound to take all goods offered to them at any of their stations, and forward them within a reasonable delay, unless some valid reason be assigned for refusing to do so; and that they cannot rid themselves of this obligation by a mere notice stating they have ceased to carry any particular class of goods. (2)

(1) As to penalty for exacting extortionate tolls, see sec. 290.

(2) *Rutherford v. G. T. R. Co.*, 20 L. C. J. 11.

CHAPTER X.

CARRIERS.

CARRIERS OF GOODS.

1. *Nature of liability.*
2. *Limitation of liability for negligence.*
3. *Limitation of liability generally.*
4. *Through bills of lading; liability beyond carrier's line.*
5. *Limiting liability beyond line.*
6. *Other conditions limiting liability.*
7. *Liability of succeeding carriers.*
8. *When contract of carriage begins.*
9. *Contract of carriage—acts of agents.*
10. *Stoppage in transitu.*
11. *Liability after arrival of goods.*
12. *Liability as warehousemen.*
13. *Reasonable time for removal.*

CARRIERS OF PASSENGERS.

14. *Nature of liability.*
15. *Degree of care.*
16. *Latent defects in vehicle or roadbed.*

17. *Insufficiency of roadway.*
18. *Crown as a carrier.*
19. *Degree of care due those who are not regular passengers.*
20. *Riding in unauthorized place.*
21. *Duties of railway servants in charge of train.*
22. *Alighting from trains at stations.*
23. *Boarding the train.*
24. *Delays in carriage of passengers.*
25. *Limiting liability.*
26. *Notice of limitation of liability.*

PASSENGERS' BAGGAGE.

27. *Checks.*
28. *Personal baggage.*
29. *Unchecked baggage.*
30. *When liability begins.*
31. *When liability ceases.*
32. *Liability of sleeping car companies.*
33. *Limiting liability.*
34. *Prescription or limitation of actions.*

Carriers of Goods.

Nature of liability.

1. It has been pointed out, that the company are bound to receive and carry and deliver, with the exceptions mentioned in the Act, all goods offered for transportation upon due payment of the tolls or freight; and that an action lies against the company for neglect or refusal in the premises, and that the company cannot relieve themselves by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants. (1) These provisions of the Act are practically

(1) *Supra*, p. 292.

in accordance with those of the Quebec Code on the subject of carriers. By Art. 1673, they are obliged to receive and convey, at the time fixed by public notice, all goods offered for transportation, unless there is a reasonable and sufficient cause of refusal, and are liable for all goods that have been received in their cars or delivered to them to be placed on the train. (1) Under Art. 1675, they are liable for the loss and damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself. Under the provisions of this article, the liability of common carriers of goods is practically absolute, and under the common law the liability is practically the same. (2) They are in effect insurers of the goods entrusted to them for carriage, and will not be excused for the loss or damage to such things, with the exceptions mentioned. As to what constitutes the first exception, that is, a fortuitous event or irresistible force, much has been written and said, but the English expression "the act of God and the Queen's enemies" may roughly express it. To constitute a case of either fortuitous event or irresistible force, there must ensue the happening of an event which cannot be foreseen, and is absolutely beyond the control of the carrier, and by this is meant not mere accidents, such as the derailing of a train or the occurrence of fire, etc., but something which is beyond the control of man, such, for instance, as a convulsion of nature, earthquake, lightning or deluge. The absence of negligence alone will not excuse the carrier; he may have used the greatest possible diligence and care to avoid every possible cause of accident or loss, and yet he will not be excused, unless he can show that it was due to something beyond the foresight or control of man. (3) We are speaking, now, of the liability of carriers of goods only, for, as we will have occasion to point out later and more in detail, the liability of carriers of passengers is not so extended, and depends upon the absence or presence of negligence, both in Quebec and

(1) C. C. 1674.

(2) *Coggs v. Bernard*, 1 Smiths L. C. 8th ed., p. 213; 2 Redfield 6; *Angel on Carriers*, 5th ed., sec. 275; *Browne on Carriers*, 89.

(3) *Chalifoux v. C. P. R. Co.*, M. L. R., 3 Q. B. 324; 14 R. L. 149, and authorities there cited.

the other Provinces; and in Quebec rests upon the principles laid down in Art. 1053 of the Civil Code, which makes every one responsible for the damage or loss caused by his positive act, fault or want of care.

Carriers are also excused, within the meaning of this exception, by what is called the act of the Queen's enemies or restraint of princes, that is to say, where the carriage of goods is prevented by state of war or siege, as being a state of things beyond the control of the carrier. The second exception to this liability of the carrier is founded upon the reasonable principle that he should not be held liable, where the loss or damage has arisen from a defect in the thing itself. For instance, if it is a perishable article, and has been carried with due despatch and diligence, and yet, from its nature, is destroyed or diminished in value, the carrier could not be held liable. A good example of this is furnished by the case of *Seymour v. Sincennes*, (1) where it was held that the heating of oats during transit, accelerating the natural evaporation, was sufficient reason for the diminution of the grain in the proportion of three per cent., and the carrier sued for failure to deliver the whole quantity of cargo as placed on board, was relieved to that extent. Or, again, if loss has arisen through the insufficiency of the package in which the article is put up, as, for instance, a leaky or defective cask, in which liquids are placed, a carrier could not be held responsible for the consequent loss. (2) Again, if the things carried be live animals, and they perish without fault on the part of the carrier from sickness or their natural disposition, the carrier would not be responsible.

Limitation of
liability for
negligence.

2. This liability is absolute, but may be limited by notices or conditions, providing always that the company cannot by contract relieve itself from the results of its own negligence or that of its servants. (3) The same provision will be found in Art. 1676 of the Quebec Code, by which it is provided that notices by carriers of special conditions limiting their liability are binding only upon persons to whom they are made known, and, notwithstanding such notice and knowledge, the carriers are liable whenever it is proved that the damage was caused by their fault or the fault of those for whom they are responsible.

(1) 1 R. L. 716.

(2) Browne, 104.

(3) Sec. 246, sub-sec. 3.

To take these principles in detail: the principle that the railway companies, as common carriers, are insurers of the goods, and cannot exempt themselves from liability for negligence by any notices, conditions, or even contract, the jurisprudence has been long well settled in this country; though, as to the last stated proposition, grave doubts have been expressed in recent years, as to its application in all cases, by judges whose opinions are entitled to the highest respect. (1) This principle was upheld in Quebec as early as 1834, in a case of *Hart v. Jones*, (2) where a judgment, dismissing the plaintiff's action to recover from a carrier the value of three crates of earthenware which had been entrusted to him in good order, and arrived at their destination in a damaged condition, was reversed, and the carrier held liable; the Court further holding that if the carrier pretended that fraud or concealment had been practised, the burden of proof was upon him. And again, in 1859, in the case of *Harris v. Edmonston*, (3) it was held that a condition in the bill of lading relieving the carrier from liability for leakage, breakage, or rust, did not release him from the obligation of paying for the loss, when negligence was shown. (4) This principle, as to the liability of carriers of goods, has been well laid down in the case of *Chalifoux v. C.P.R. Co.* (5) The judgment of Judge Mathieu in that case in the Superior Court points out very lucidly the liability of carriers of goods (6) though erroneously applying that principle to the carriage of passengers, the judgment on that point having been subsequently reversed in the Supreme Court. (7)

The principle was again maintained in the Supreme Court in the case of *Vogel v. G. T. Ry. Co.* (8) In that case a car was hired for the purpose of carrying horses. The shipper signed a shipping note, by which he agreed to the condition that he undertook all risk of loss, injury, damage, etc., and it was held that

(1) *Vogel v. G. T. Ry. Co.*, 10 Ont. A. R. 162; and per Burton, J. A., at p. 173; and per Strong, J., in the same case, 11 S. C. R. at p. 628; and per Taschereau, J., at p. 638; per Cameron, C. J., in *Bate v. C. P. Ry. Co.*, 14 O. R. at p. 640; and per MacMahon, J., in *Cobban v. C. P. Ry. Co.*, 26 O. R. at p. 763.

(2) *Stuart's Rep.* 589.

(3) 4 L. C. J. 40.

(4) See also *Campbell v. G. T. Ry. Co.*, 3 R. L. 451; and *Bedarride Ch. de Fer*, Vol. 2, No. 426.

(5) *M. L. R.*, 3 Q. B. 324.

(6) 14 R. L. 149.

(7) 22 Can. S. C. R. 721.

(8) 11 S. C. R. 612.

the provision of the then Railway Act, similar to sec. 246 of our present Act, prohibited the railway company from availing themselves of the condition relieving the company from liability where the horses were injured by a collision occurring through the negligence of the company's servants.

In this case, however, there were two dissenting judges, Strong & Taschereau, J.J., holding that the words "notice, condition or declaration" in the section of the Consolidated Act of 1879, corresponding to sec. 246 of the present Act, contemplate a public or general notice, etc., and do not prevent the railway company from entering into a special contract to protect themselves from liability. (1) Mr. Justice Taschereau was very positive in his opinion that the section in question does not prohibit the company from entering into a special contract with the shipper, relieving them from liability for negligence. His Lordship said: "Why should parties desirous of making such contracts be deprived of their common law right to do so? * * * * Has the Legislature deprived them of that right? It would require express words to bring me to the conclusion that it has done so. I cannot find them in the statutes." The majority of the Court took the other view, however, and their decision is binding law.

In a later case (2) the Court held that the provisions of this section do not disable a railway company from entering into a special contract for the carriage of goods, and limiting its liability as to the amount of damages to be recovered for loss or injury to such goods arising from negligence. The Court thus drew a distinction between the right of a company to relieve itself by contract from all liability for negligence, and the right to limit the amount of such liability. In this case the plaintiff delivered to the railway company for carriage a valuable horse, and signed a contract of carriage, in which it was stipulated that the company should in no case be responsible for any amount exceeding \$100 for any horse. The horse was killed by the negligence of the company's servants, and the plaintiff took action for \$5000 as its value. The Divisional Court held that the plaintiff's right to recover damages was restricted to the sum of \$100. (3) On

(1) But see *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 473.

(2) *Robertson v. G. T. Ry. Co.*, 24 S. C. R. 611.

(3) 24 O. R. 75.

appeal the Court was equally divided, (1) and the judgment therefore stood affirmed. It was held by the Chief Justice (*Hagarty C. J. O.*) that the special limitation having been entered into in good faith on the declared value of \$100, and not for the purpose of evading liability, was valid and not in contravention of sec. 246. And, holding that the rate of carriage was clearly fixed as on a declared value of \$100, said:—"I think it a very fair and reasonable course for the carriers to contract that they will carry the animal so valued at the named rate. If the plaintiff had announced that his horse was a racer worth \$5000, it is shown that he could not have had it carried without authority from headquarters, fixing a rate in some degree commensurate with the high value and the consequent risk." (2) * * * "It seems unreasonable to allow a plaintiff to mislead and deceive them by agreeing in writing to restrict their liability as for a horse valued at \$100, and thus, and thus only, to undertake its carriage, and then to ask for \$5000, or fifty-fold its value." (3) *Osler, J. A.*, agreed with the Chief Justice that there is nothing in the Act which forbids a fair agreement between the carrier and the shipper limiting the sum for which, in case of loss through negligence, the former would be liable, although the shipper cannot be forced into such an agreement; and that in the present case the shipper was estopped from contending that the horse was of greater value than the amount agreed upon. (4)

MacLennan, J. A., while of opinion that an agreement limiting the amount of damages would be valid, as being in effect a pre-ascertainment of the amount; held that the contract in question, having regard to the freight classification made under sec. 226, did not effect such a limitation. (5) *Boyd, C.*, held that the limitation of liability for damages arising from negligence was invalid under section 246. After referring to the section of the English Railway & Canal Traffic Act, 1854, (6) providing in terms for the making of a special signed contract by which liability may be limited, and the omission of any similar provision from

(1) 21 Ont. A. R. 204.

(3) Ibid. at p. 208.

(5) Ibid. pp. 225-227.

(2) Ibid. at p. 206.

(4) Ibid. at p. 218.

(6) 17 and 18 Vic., cap. 31, sec. 7.

our Act, the learned Chancellor went on to refer to the case of *Great Western Ry. Co. v. McCarthy*, (1) in which cattle were carried under a special contract at a reduced rate, in consideration of the company being relieved from all liability for damage or delay, unless loss arose through the wilful misconduct of the company; and said: "By this the company were held to be protected by a proper condition, for the shipper had the offer of a just and reasonable alternative: It may be that legislation is needed in Canada to adopt alternative rates; * * * but, assuming that it could be done without, here it does not appear that any option was given to the plaintiff; he was not told of any alternative, nor was there indeed any provision made in Canada for the transportation of high price horses at higher rates on the road. The company had a uniform rate for horses, based, it may be, on some average of weight or value, which was charged and paid as a matter of course. And upon this they impose the condition that limits the scale of damages in case of loss by negligence, which, it appears to me, transcends the statutory powers, and is not made any better because the shipper has signed the writing in which it is embodied. The Canadian Act strikes at this, lest the public be coerced by a practical monopoly; (see *Manchester Ry. Co. v. Brown*, 8 App. Cas. at p. 712) in other words, the attempt is made without legislative power to introduce an owner's risk at reduced rates as the standard, so as to relieve the company from their full risk, which as carriers they would be subjected to by collecting the ordinary or proper rate. Apart from what has been said, it appears to me that the whole scheme of the Canadian Act is repugnant to this method." (2)

In the Supreme Court it was held that the words "shall in no case be responsible," contained in the contract, were sufficiently general to cover all cases of loss however caused, and that the plaintiff could not recover more than \$100. The Chief Justice (*Sir Henry Stong*) distinguished *Vogel's case*, (3) pointing out that nothing there decided established that it was not competent for a railway company to enter into an agreement for pre-ascertained damages or for limited liability. And, after

(1) 12 App. Cas. 218.

(3) 11 S. C. R. 612.

(2) 21 Ont. A. R. at p. 212.

quoting the section of the Act, said: "This is an enactment which should not be extended beyond its literal meaning, and that is plainly confined to the prohibition of any contract relieving the company from liability for negligence. To say that it is to shut out the company from limiting its liability for damages by an agreement fixing a value on goods carried, would be to extend its language by implication to a case which does not appear from any part of the Act itself to have been within the contemplation of the legislature. So far, indeed, from this being so, we may reasonably infer that the Legislature never intended to enact a provision which would most assuredly have the result so forcibly pointed out in the judgment of the learned Chief Justice of Ontario, viz., that when it was sought to compel the company to carry property of great value for rates which would not cover the equivalent of a fair premium for insuring, we should find the company refusing to carry, and thus, on a calculation of profit and loss, preferring to pay damages for such refusal to incurring a risk without adequate compensation." (1) He also referred to the case of *Hart v. Pennsylvania Ry. Co.*, (2) in the Supreme Court of the United States, and quoted the language of Blackford, J., in delivering the judgment of the Court, as follows: "It is the law of this court that a common carrier may, by special contract, limit his common law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants." (3) Taschereau, J., adopted the reasoning of the Chief Justice of the Court of Appeals; (4) and Sedgewick and King, J. J., concurred with Sir Henry Strong's opinion, (5) and Gwynne, J., distinguished *Vogel's case* chiefly on the ground that since its decision, a new tariff and classification of rates had been adopted, and approved by the Governor-in-Council under sec. 226 of the Act. (6)

The effect of these two important cases (5) is to settle the law in this country, so that while railway companies may not under the Act escape from liability for loss occasioned by delay

(1) 24 S. C. R. at p. 616.

(3) 24 S. C. R., at p. 617.

(5) *Ib.* p. 621.

(7) And see *Cobban v. C. P. Ry. Co.*, 26 O. R. 732.

(2) 112 U. S. 331.

(4) *Ib.* at p. 618.

(6) *Ib.*, pp. 618-620.

or damage through negligence to goods carried by them, under any condition or agreement to the contrary, yet they may by special contract limit the amount of loss to be paid, in any reasonable manner:—"an illusory limit or a nominal agreed on value would not avail." (1)

Limitation of
liability
generally.

3. It being without doubt that railway companies as carriers of goods are, in the absence of contract, liable at all events and practically as insurers, it remains to be considered in what way and to what extent they can limit this liability, apart from the question of negligence. In the early history of railway companies, the means resorted to of limiting their liability was by conditions contained in notices posted in their stations and offices, and by other means sought to be brought to the knowledge of the shippers of goods. Where railway companies have attempted to limit their liability by conditions contained in such notices, they have always been held to strict proof that such conditions have been brought to the actual knowledge of the party shipping, and many cases have turned upon the question as to whether such knowledge was proved or not. Nowadays, however, the conditions are almost all invariably inserted in the bill of lading. The bill of lading is not only a receipt evidencing the delivery to the railway company of the goods specified in it, and the place of destination, but also constitutes a contract between the shipper and the carrier, containing the terms and conditions upon which they mutually agree that the goods shall be carried, and is usually made out in two parts: one called the shipping note, being in the form of a request to the railway company to receive and carry the goods specified, to a certain destination, upon the terms and conditions expressed upon its face and back. This shipping note is signed by the shipper or his agent. The other part of the bill of lading is the receipt, whereby the railway company acknowledges to have received the goods, and agrees to carry them to their destination, upon the same terms and conditions as appear upon the shipping note. The signing of the shipping note and the delivery of the receipt to the shipper constitute a contract between them bind-

(1) Per Hagarty, C. J. O., 21 Ont. O. R. at p. 208.

ing upon both; and it is vain for the shipper afterwards to contend that he had not read the conditions, for every man is presumed to have agreed to all the conditions contained in the document to which he has affixed his signature. (1) This system of written contract between the parties does away with all the questions which formerly arose as to proof of knowledge of conditions on the part of the shipper. The right of carriers to limit their liability by conditions expressed in the bill of lading has long been recognized in this country. The leading case in Quebec is that of *Torrance v. Allan*, (2) where the doctrine was definitely recognized by our Court of Appeals. The shipper was there held bound by a condition in the bill of lading that, in the event of the steamship company with which he contracted not being able to forward his goods by the first ship, they would be forwarded by the next vessel leaving the port, and his action for damages for delay in not shipping his goods by the first ship was dismissed. The conditions which are contained in these bills of lading are as a rule very numerous, and cases under varying circumstances are arising every day, and it would be impossible here to go into them in detail: it will suffice to give the general principles by which the validity of such conditions are to be tested. First, as has been pointed out, (3) the company cannot relieve itself by such conditions from the result of its own negligence, or that of its servants. Secondly, the conditions must be just and reasonable. (4) So long as no negligence is shown on the part of the company, they would be relieved from liability, should the case come within any condition contained in the bill of lading which the court would consider a just and reasonable one.

4. As to what is a just and reasonable condition, the most striking example is that condition by which railway companies

Through bills
of lading:
liability
beyond
carrier's line.

(1) *Hutchinson on Carriers*, §§ 225-229, 237-241; *Mayer v. G. T. Ry. Co.*, 31 U. C. C. P. 248; *O'Rourke v. G. W. Ry. Co.*, 23 U. C. Q. B. 427; *Parker v. S. E. Ry. Co., L. R.*, 2 C. P. D. 416; *Harris v. G. W. Ry. Co., L. R.*, 1 Q. B. D. 515; *Grace v. Adams*, 100 Mass. 505; *Morrison v. Phillips, etc., Co.*, 28 Am. Rep. 599; *Kirkland v. Dinsmore*, 62 N. Y. 171; *O'Reagan v. Cunard S. S. Co.*, 160 Mass. 356; *McFadden v. Missouri P. Ry. Co.*, 1 Am. St. Rep. 121.

(2) 8 L. C. J. 57.

(3) *Supra* p. 296.

(4) *Peek v. North Staffordshire Ry. Co.*, 32 L. J. Q. B. 231, 10 H. L. C. 473.

have attempted to limit their liability in the carriage of goods on what is called a through bill of lading to such loss, damage or detention as may occur upon their own line of railway. By a through bill of lading is meant one by which the company receiving the goods undertakes to forward them to a point beyond the limits of its own railway, by means of other carriers, whether by land or water. It has been a much vexed question as to whether, in the absence of express contract limiting the liability of the receiving carrier, the recourse of the shipper is against him, or the carrier in whose charge the goods were when the loss occurred. The English rule is that the receiving carrier is liable, no matter where the loss occurs, that is to say, in the absence of conditions limiting his liability. The leading case in England is that of *Muschamp v. Lancaster & Preston Ry. Co.* (1) There the shipper delivered to the L. & P. Ry. Co. a parcel of goods to be carried to a point which was not upon their line of railway, but was a station on another railway which connected with theirs. The goods were lost or damaged after having passed out of the possession of the Lancaster & Preston Ry., and while in the possession of the other railway company. The Court held that the contract was one by which the L. & P. Ry. Co. undertook to forward the goods to the destination named, and that they were liable for the loss which occurred on the other railway, who acted merely as their agents in forwarding the goods. And the same principle was laid down by the House of Lords, in *Bristol & Exeter Ry. Co. v. Collins.* (2) The American rule is the exact opposite; and it has been definitely held by the Supreme Court of the United States in the case of the *Michigan Central Ry. Co. v. Myrick*, (3) that the general doctrine as to the transportation by connecting lines of carriers is that each carrier, confining itself to its common law liability, is only bound, in the absence of special contract, to carry safely over its own route and safely deliver to the next connecting carrier. There would seem to be reason in this doctrine, as the obligation imposed upon the railway companies by our statutes is only to carry over their own railway, and would entail only liability for loss or

(1) 8 M. & W. 421.

(2) 7 H. L. C. 194.

(3) U. S. Supreme Ct., 1888, 6 L. N. 69.

damage occurring to such goods while upon their railway and in charge of their servants. But the English doctrine prevails in this country, and can be supported on the ground that, by receiving goods addressed to a point beyond the limits of their railway, a railway company enters into an implied contract at the least to forward and deliver the goods there, and would be liable in default for breach of contract, the succeeding carriers acting as mere agents to forward the goods. (1) But where the carrier receives the goods, and is paid freight only for carriage to the end of his route, the fact that, at the request of the shipper, he undertakes to deliver them to another carrier, for further transportation, does not make him responsible for the delivery of the goods at the place of ultimate destination. (2)

5. But inasmuch as railway companies are not bound by law or by statute to enter into such contracts, and could not be compelled to forward goods beyond the limits of their own railway, they have undoubtedly the right to limit their liability to such loss or detention as may occur in the transit of the goods over their own line; and the difficulties which have arisen in the courts have been over the construction or interpretation to be placed upon the conditions by which railway companies have attempted to limit their liability in such cases. The ordinary form of condition which has been used by railway companies with this object has been to the effect that, where goods are destined for points beyond the limits of the railway receiving them, the company would forward the goods by public carrier or otherwise as might be convenient, and that the company's liability should cease upon either the delivery of the goods to such connecting carrier, or the deposit of the same at the last station of their line, and upon notice to the connecting carrier that the same were ready for further transportation, and a further condition that the company would not be responsible for any goods lost, damaged, missent or delayed, where such loss, damage or delay occurred

(1) *Merchants Despatch Co. v. Hatley*, 14 S. C. R. 573; *G. T. Ry. Co. v. McMillan*, 16 S. C. R. 543; *Grant v. Northern Pacific Ry. Co.*, 22 O. R. 645; *Gauthier v. C. P. Ry. Co.*, Que. Q. B., 1893, 1 M. L. D. & R. 572, confirmed in appeal Q. R. 3 Q. B. 136, and see 2 *Pardessus* 576; 2 *Bédarride Ch. de Fer* 424.

(2) *Jeffrey v. Can. Shipping Co.*, M. L. R., 7 Q. B. 1.

after the goods had been delivered at the station nearest to the point of destination and beyond their limits. In the Province of Quebec this condition has been almost invariably held to relieve railway companies from loss or damage resulting from injury or delay to goods occurring in the carriage of the goods upon the lines of other railway companies than that receiving the goods. The leading case is that of *Chartier v. G. T. R. Co.*, (1) where goods were delivered to the Grand Trunk Railway Company to be carried to a point in the United States, the bill of lading containing conditions similar to those which have just been mentioned. The goods were carried by the G. T. Ry. to Rouse's Point, and there delivered to the Central Vermont Railway Company for further carriage to their destination, and were damaged in transit on the railway of the latter company. In an action by the owner against the G. T. R. Co. for the consequent loss, the action was dismissed, upon the ground that the condition was a just and reasonable one, and relieved the railway company. This decision was followed by a number of others in the same sense. (2)

In a case of *Charbonneau v. C. P. R.*, (3) however, Mr. Justice Gill departed from the previous jurisprudence of the Superior Court, and held that the railway company was responsible. There the plaintiff had shipped a carload of apples by the C. P. R. Co. to London via New York, on a through bill of lading containing the conditions above mentioned. It was proved that the shipper knew that the defendant's line of railway only went as far as Brockville, and that at this point the goods would be transhipped to other connecting carriers, and by them carried to New York, and thence by ship to London. The Judge held that the company's contract was to carry the goods to New York, and that though it was proved that the damage to the apples occurred after their arrival at New York, but before their delivery to the steamship company, he held that the defendants were liable. This judgment, however, was reversed by the Court of Appeals, (4) who held that the true meaning of the condition

(1) 17 L. C. J. 26.

(2) *Pratt v. G. T. R.*, 1 L. N. 69; *Robichaud v. C. P. R. Co.*, 8 L. N. 314; *Dionne v. C. P. R.*, M. L. R., 1 S. C. 168, confirmed in *Review* June 30, 1885; *Beaumont v. C. P. R.*, M. L. R., 5 S. C. 255.

(3) 19 R. L. 317.

(4) *Ibid.*

was that the defendants were only liable for such damage as might occur during the transit of the goods on their own line, and the condition being just and reasonable and agreed to by the shipper, they were relieved. The question has come up, however, before the Supreme Court, and been decided in an Ontario case, (1) where the Supreme Court held that similar conditions did not relieve the company contracting from loss occurring in the transit of the goods to the point of destination, but did relieve the company for the loss occurring after their arrival. In that case, the G. T. R. Co. undertook to carry certain goods on a through bill of lading to Portage La Prairie, a station on the line of the C. P. R. The bill of lading contained a condition similar in effect to those already cited, providing that the company should not be responsible for any loss or "damage" that might "happen to goods sent by them, if such loss or damage occurred after such goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their said limits." The goods arrived safely at Portage La Prairie, and the loss occurred after their arrival there but before their delivery to the consignees. The Court held that the language of the condition did not relieve the company for any loss which might have occurred in the transit. This opinion of the court was obiter, as being unnecessary to the decision of the case, the loss having occurred after the transit had been completed, but is of course entitled to great respect, and was arrived at in accordance with the decision of the House of Lords in the case of the *Bristol & Exeter Railway v. Collins*. (2) These two cases will repay careful perusal. They are too lengthy to deal with in detail here, but it is well to note that the conditions in the *Collins* case were not the same as those in the *McMillan* case, as was ably pointed out by Judge Strong in the

(1) *McMillan v. G. T. R. Co.*, 15 Ont. A. R. 14, 16 S. C. R. 543; see also *Rogers v. G. W. Ry. Co.*, 16 U. C. Q. B. 389; *Lapointe v. G. T. Ry. Co.*, 26 Q. B. 479; *Devlin v. G. T. Ry. Co.*, 30 Q. B. 537; *Gordon v. G. W. Ry. Co.*, 34 Q. B. 224; *Mason v. G. T. Ry. Co.*, 37 Q. B. 163; *Rennie v. Northern Ry. Co.*, 27 U. C. C. P. 153; *Roach v. C. P. Ry. Co.*, 1 Man. 158; and *Hamilton v. G. T. Ry. Co.*, 23 U. C. Q. B. 600; *Bates v. G. W. Ry. Co.*, 24 Q. B. 544; *Spettigue v. G. W. Ry. Co.*, 15 C. P. 315; *Braugh v. G. T. Ry. Co.*, 26 Q. B. 479.

(2) 7 H. L. C. 194.

Supreme Court. The House of Lords in effect held that, whatever the railway company may have intended to express by these conditions, their language could only be interpreted to limit the liability of the company after the delivery of the goods at the point of destination. The decision of the Supreme Court is clear, however, upon one point, that inasmuch as the railway company are not bound by statute or by the common law to carry goods beyond the limits of their own line, they can relieve themselves by contract from liability for losses occurring beyond such limits, and that though such contract is one to carry or forward the goods to their ultimate destination, and the connecting carriers are only to be looked upon as agents of the contracting company, still, conditions may be made which, if properly framed, would relieve the contracting company from liability for the losses which might occur while the goods were in transit in the hands of other carriers. This doctrine has been recognized also in England in the case of *Aldridge v. Great Western Railway Company*, (1) where a condition by which the contracting railway company was relieved from liability for loss occurring to goods while in transit over the line of another railway company was held to be just and reasonable, and to relieve the railway company from loss.

There was a strong opinion expressed in the *McLachlan* case (2) by *Strong and Taschereau*, J. J. (Gwynne, J., concurring, J. J., diss.), that the loss having occurred after transit was over and the goods delivered, the liability of the company, as carriers, had ceased, and the condition reduced the contract to one of mere bailment as soon as the goods were delivered, and also exempted the company from liability as warehousemen, and the goods were from that time in the custody of the company on whose line Portage La Prairie was situated, as bailees for the shipper.

The conclusion to be derived from these cases appears to be this, that by issuing a through bill of lading to a point beyond the limits of its own road, a railway company enters into a contract to carry or forward the goods to that point, and the other carriers over whose line it may be necessary that the goods should

(1) 33 L. J. C. P. 161; and see *Fowles v. G. W. Ry. Co.*, 22 L. J. Ex. 76; and *Mytton v. Midland Ry. Co.*, 28 L. J. Ex. 385.

(2) 16 S. C. R. 543.

pass, in order to reach their destination, must be looked upon as the agents of the contracting company, and for failure to deliver goods at their destination, or for any loss which may result by injury to or detention of the goods while in the course of transit over these connecting lines, the contracting company is liable, unless by the clear terms and express conditions of the contract of carriage it has exempted itself from such liability; and such a condition so exempting a contracting carrier is just and reasonable, and will be given force and effect to by the Courts. (1)

6. Among the conditions which have been considered by the Courts valid as relieving railway companies from liability, there are special conditions necessitated by the nature of the goods carried. Certain kinds of merchandise naturally necessitate special conditions, and especially is this the case with regard to perishable or fragile goods. It has been held in England that a condition that fresh fish would only be carried under special agreement and by particular trains, and that the company should not be held responsible under any circumstances for loss of market or other injury arising from delay or detention of trains, exposure to weather, storage, etc., or from any causes other than gross neglect or fraud, was just and reasonable and binding on the shipper. (2) On the other hand, a condition excluding all risks whatever of conveyance, loading and unloading, upon the

Other conditions limiting liability.

(1) The Merchants Despatch Transportation Co. contracted to carry a quantity of butter from London, Ont., to England, the butter to be carried from London to the Suspension Bridge at Niagara Falls by the Great Western Ry Co., thence to New York by the Transportation Co., there to be delivered to a steamship company for carriage to England. A clause in the bill of lading provided, that if damage was caused to the goods during transit, the sole liability was to be on the company having the custody of the goods at the time of such damage occurring. The butter was carried to New York, and there placed on lighters belonging to the Transportation Company to be conveyed to the SS. "Dorset." Owing to the lighters not being able to get alongside the steamer, she sailed without the butter, and it was only forwarded five days later by another vessel of the steamship company. In the meantime, the butter was damaged by heat while still in the lighters. It was held by the Supreme Court, affirming the judgment of the Ontario Court of Appeals (12 Ont. A. R. 201) that the Transportation Company, having made a contract for the through carriage of the goods, were liable for the damage, and were not relieved under the clause in the bill of lading, as the butter was never delivered to the steamship company, but was in the custody of the Transportation Company when the damage occurred. *Merchants Despatch Transportation Company v. Hutely*, 14 S. C. R. 572.

(2) *Beal v. South Devon Ry. Co.*, 11 L. T. N. S. 184, 29 L. J. Ex. 441.

ground that the company refused to be responsible for any injury or damage, however caused, occurring to live stock, was held to be unreasonable. (1)

The same rule has been applied in the State of New York with regard to another perishable article—plate glass, in the case of *Nelson v. Hudson River Ry. Co.* (2) And the same principle has been recognized in the Quebec Courts as to carriers by water in the case of *Mongenais v. Allan.* (3) Plate glass is a very good illustration of one kind of perishable goods against loss for which railway companies or other carriers have the right to protect themselves. Its value is great, and it occupies a large space and is very subject to breakage, and carriers generally in this country have refused to carry plate glass except upon special conditions, either relieving them from liability for breakage, or upon payment of an extra rate of freight as insurance. There is nothing in the Railway Act which would prevent companies from imposing a special rate upon the carriage of such goods, provided that such rate be charged equally to all persons under the same circumstances for the same class of goods; but, of course, any such rates would have to be approved by the Governor in Council, (4) and, under the recent decisions, (5) would not relieve carriers from liability if breakage should occur from negligence. If perishable articles, such as fruits, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If, through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable.

Another condition, with regard to defects in the thing itself, or the "proper vice," as it is called in England, is that by which companies seek to relieve themselves from liability for injury to live animals occasioned by their unruliness, kicking, plunging, etc. Such a condition has been held to be reasonable and binding in England in the case of *Kendal v. London & S.W. Ry. Co.*

(1) *McManus v. Lancashire & Yorkshire Ry. Co.*, 28 L. J. Ex. 353.

(2) 48 N. Y. 498.

(3) Q. R. 1, Q. B. 181.

(4) *Cobban v. C. P. Ry. Co.*, 26 O. R. 732.

(5) *Supra*, pp. 297 et seq.

(1) That was the case of the carriage of a horse. On arrival, he was found to be much cut about, especially about the forelegs and fetlock joints. It was admitted that the defendants had been guilty of no negligence, and the point involved was whether they were liable, as insurers, for the safety of live animals as in the case of goods. The jury entered a verdict for the plaintiff, but the question of liability was reserved for the full court. The opinion of Baron Bramwell clearly expresses the doctrine in such cases. He said: "The horse was the immediate cause of its own injuries. It slipped, or fell, or kicked or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, its proper vice, defendants are not liable; but if it so hurt itself from the defendant's negligence or any misfortune happening to the train, though not through any negligence of defendants, as, for instance, from the horse-box leaving the line through some obstruction maliciously laid upon it, then the defendant would, as insurers, be liable."

The consignee cannot refuse to receive the goods from the carrier because they were damaged, but has his remedy in an action of damages. (2)

Where goods are taken at a cheap rate of carriage, the company will not be liable for damages caused by the packing being insufficient, and where the goods were wrongly described. For instance, where the goods were electrical fittings in china and porcelain, and were described as hardware, it was pointed out that the company's servants would not handle with the same care goods which they understood to be hardware, as they would a case of china. (3) In another case, a piano carefully packed was handed to the carriers, and it was received by the consignee in a damaged condition. It did not appear clear how the damage was sustained, and the Court, holding that the burden of proof being upon the carriers to show that the damage had not occurred through their fault or negligence, which they failed to

(1) 41 L. J. Exch. 184; 26 L. T. N. S. 735; and see *Blower v. G. W. Ry. Co., L. R., 7 C. P. 655*, 41 L. J. C. P. 268; and *Hawkins v. G. W. Ry. Co.* (15th Feb., 1895).

(2) *Halcrow v. LeMesurier*, 21 Rev. Leg. 28; *Bailly v. R. & O. Nav. Co.*, 20 Rev. Leg. 127.

(3) *Connelly v. The Great Northern Ry. Co.*, 15 Legal News 365.

do, were liable ; but the dissenting judge thought that as the piano was of a new patent type, and contained attached to the wires 160 weights of one pound each, the express company not being informed of its unusual character, could not be supposed to handle it with a care beyond that required for an ordinary piano. (1)

Where the company's time-table showed that the time for transporting between two places was two hours, a delay of twenty-four hours for carriage of fresh meat in summer was held unreasonable. (2)

The heating of hay causes an increased evaporation and a corresponding shrinkage, and proof of this will exonerate the carrier from short delivery. (3)

Liability of
succeeding
carriers.

7. A carrier who receives goods *en route* from another carrier, and enters them on his way-bills, and collects the freight, is, nevertheless, not responsible for goods lost by the first carrier. (4)

Neither is the second carrier responsible for delay in the delivery of the goods, caused by an error in the way-bill of a preceding carrier, delivered to the succeeding carrier with the goods, the way-bill stating the wrong place of destination. (5)

Where a railway company received from another company a sealed car said to contain 150 barrels of flour, and transported it to destination, when, on the car being opened, it was found to contain only 142 barrels, the Court held that the second carriers, not being parties to the original bill of lading, were not bound by it, and had fulfilled all their obligations by the delivery of the contents of the sealed car. (6)

In another case, certain bars or bundles of iron came by ship from Glasgow to Montreal consigned to the plaintiff at Guelph, Ont. His agent gave to the agent of a railway company an order to get the goods from the ship, and afterwards received

(1) *Quimet v. The Canadian Express Co.*, 32 L. C. J. 319.

(2) *Delorme v. C. P. R.*, 11 J. -v. News 106 ; and see *Pontbriand v. G. T. R.*, M. L. R. 3, S. C. 61.

(3) *Seymour v. Sincennes*, 1 N. L. 716 (Q. B. 1869).

(4) *Behan v. G. T. Ry. Co.*, 17 Q. L. R. 299 ; in this case, defendants were condemned to pay the costs of the suit, as the plaintiff was misled by their way-bills.

(5) *Trester v. C. P. Ry. Co.*, Q. R., 1 Q. B. 12.

(6) *Wade v. C. P. Ry. Co.*, 8 L. N. 348.

from the railway company a receipt specifying the number of bars and bundles and the gross weight, with a printed notice on the face of the receipt that "rates of weights entered in receipts or shipping bills will not be acknowledged." All the iron received by the railway company was delivered at Guelph, but there was a very considerable deficiency in the weight as stated in the receipt. So far as appeared, the iron had not been weighed either on being taken from the ship or afterwards. It was held that the railway company were not estopped by the statement of weight in the receipt, and were not liable for more than they actually received from the ship and delivered to the plaintiff. (1)

8. Again, the question arises, when does the contract of carriage begin so as to fix upon the company the responsibility of carriers? The following case may be taken as a good illustration of the question. Plaintiff delivered a planing machine to defendants to be carried between two stations. In placing it on board a car for that purpose, defendants' servants injured the machine by negligence or want of proper appliances. It was held that defendants were liable, notwithstanding the special contract that the machinery was to be carried at the owner's risk. (2) As was said in that case, "when the plaintiff placed the planer on the platform, paid the freight, and made, tacitly or otherwise, the agreement for carriage expressed in the receipt note, an implied contract arose between him and the defendant company that the latter would, with reasonable care, take the machine and carry it under the terms and conditions of the receipt note." (3) "I think it may be further said, with good reason, that the limited contract contained in the receipt note was made on the assumption that the company would provide proper means for putting the planer on their cars, and that in this view the decision of *G.T.R. v. Fitzgerald* (4) will apply." (5) The conditions of carriage contained in the bill of lading or receipt note do not extend to what occurs before

When contract of carriage begins.

(1) *Horseman v. G. T. Ry. Co.*, 31 U. C. Q. B. 535; see also *Milligan v. G. T. Ry. Co.*, 17 C. P. 115.

(2) *Whitman v. W. C. Ry. Co.*, 5 Russ. & Geld. 405; and see *G. T. R. v. Mountain*, 6 L. C. J. 173.

(3) *Whitman v. W. C. Ry. Co.*, 5 Russ. & Geld. at p. 409.

(4) 5 S. C. R. 204.

(5) *Whitman v. W. C. Ry. Co.*, 5 Russ. & Geld. at p. 409.

the lading. (1) In another case (2) where the plaintiffs shipped lumber by the defendants, loading the car themselves, there was a short delivery of the lumber, and no evidence as to how the loss occurred, it was held that the defendants were liable. But if the defendants could have shown that the plaintiffs agreed to do the loading, and loaded the lumber so badly, that it was lost through their improper loading, that no doubt would make out a defence, unless it could be shown that by the use of ordinary care the damage would not have been as extensive as it proved to be. (3)

Contract of
carriage, acts
of agents.

9. Where the only evidence of the contract to carry was that the foreman of the freight department at one of the defendants' stations agreed to have certain trees forwarded to a station not on the defendants' line, but on one connecting therewith, it was held that this was evidence to be submitted to a jury of a contract to that effect binding the defendants. (4) In another case (5) plaintiff sent by another man a box of goods to be forwarded on the defendants' line, who, seeing several men working at the freight shed, told one of them he had a box to forward. The man told him "to bring it and put it in there," which he did. He got no receipt. The box was lost. Plaintiff then went to the station and saw the man already referred to, who admitted he got the box, but could not say what he had done with it. It was held that the admission of the man whom plaintiff saw was not admissible as evidence against the defendants, and as it was the only evidence of delivery, the plaintiff should be nonsuited. (6)

The very recent case of *Northern Pacific Railway Company v. Grant* (7) affords a good illustration of the powers of an agent to bind the railway company. There one Evans, residing

(1) *Tattersall v. Nat. St. Co.*, L. R., 12 Q. B. D. 297.

(2) *Henry v. C. P. R.*, 1 Man. 210.

(3) *Id.*, & *Hutchinson v. Guion*, 5 C. B. N. S. 149; *Hart v. Jones*, *Stuart's Rep.*, p. 589.

(4) *McGill v. G. T. R.*, 19 Ont. A. R. 245.

(5) *Young v. C. P. R.*, 1 Man. 205.

(6) And see *Leigh v. Smith*, 1 C. & P. 638; *Griffin v. The Great Western Ry. Co.*, 15 U. C. Q. B. 507; *Slim v. The Great Northern Ry. Co.*, 14 C. B. 647; *The Great Western Ry. Co. v. Willis*, 18 C. B. N. S. 748.

(7) 24 S. C. R. 546; affirming 21 Ont. A. R. 322, 22 O. R. 645.

at Victoria, B.C., being about to purchase goods from a firm of Grant & Co. in Ontario, wrote to that firm, at the request of the railway company's agent at Victoria, asking them to ship the goods *via* Grand Trunk Railway and Chicago & N. W., care of the Northern Pacific at St. Paul's. The freight agent at Victoria forwarded the letter to the freight agent of the latter company at Toronto, who sent it Grant & Co., writing them himself as follows;—"I enclose you card of advice, and if you will kindly fill it up when you make the shipment and send it to me, I will trace and hurry them through, and advise you of delivery to consignee." Grant & Co. shipped the goods as suggested in this letter, deliverable to their own order. It was held that on arrival of the goods at St. Pauls, the Northern Pacific were bound to accept delivery of them for carriage to British Columbia, and to expedite such carriage; that they were in that company's care from St. Paul's to British Columbia; that the agent at Toronto had authority to bind the company; and that the company were liable to Grant & Co. for the value of the goods, which were improperly delivered to Evans without an order from Grant & Co. and not paid for. (1)

The company will not be excused from liability because the disregard of duty on the part of the agent was willful. (2) In determining the liability of the company for the acts of its agents, the true inquiry is whether the agent was acting within the scope of his employment. If so, his acts bind the company, whether willful or negligent. (3)

10. The carrier's interest in this question, says Mr. Redfield in his work on railways, arises only when he is required by the vendor, while the goods are still in his possession, to redeliver them to him or some one on his account. After such demand, it becomes important to the carrier, to determine whether the right to reclaim the goods still exists. For if so, and the carrier decline to redeliver them, or deliver them to the vendee, he and all persons claiming to detain them against the claim of the vendor become liable for the value. (4) The authorities show that the vendor has

Stoppage in transitu.

(1) See also as to authority of agents, *supra*, pp. 29-30.

(2) *Weed v. Panama Railroad Co.*, 5 Duer 193.

(3) Redfield, Vol. 2, § 182, sec. 3, note 2.

(4) Redfield, Vol. 2, § 186, No. 8-10; *Campbell v. Jones*, 3 L. C. J. 96.

a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. In order that the vendor should have lost that right, the goods must be in the hands of the purchaser or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary. (1) The law has been very clearly and accurately laid down by the Master of the Rolls in the case of *Bethell v. Clark*, (2) which was approved by the Privy Council in *Lyons v. Hoffnung*. (3) He says: "When the goods have not been delivered to the purchaser, or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such, and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept the delivery so as to pass the property, nevertheless, the goods are *in transitu* and may be stopped."

And in the same case, Cave, J., said: "When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them *as warehouseman* for the purchaser, and no longer as carrier only, the *transitus* is at an end." The doctrine of stoppage *in transitu* has always been construed favorably to the unpaid vendor, (4) and on these grounds, we can reconcile the Ontario case of *Anderson v. Fish* (5) with the general statement of the law as given above. In this case, the defendants, unpaid vendors of goods, shipped them over the Grand Trunk Railway to the vendee at W. When the goods arrived, the railway company's agent at W. sent an advice note to the vendee, who refused to take it. After this, the vendee assigned to the plaintiff for the benefit of his creditors, and the plaintiff, as soon as the assignment was delivered to him, produced it to the railway company's agent, and claimed the goods, offering to pay the freight, but producing no advice note. The agent did not refuse to deliver the goods, but stated that, according to the rules of the company, when the person claiming the goods was an assignee for the benefit of creditors, his duty

(1) Per James, L. J., in *Ex Parte Rosevear China Clay Co.*, 11 Ch. D. 560 at p. 568.

(2) L. R., 20 Q. B. D. at p. 617.

(3) 15 App. Cas. 391 (1890).

(4) *Bethell v. Clark*, L. R., 20 Q. B. D. 617, Lord Esher, M. R.

(5) 16 O. R. 476. Confirmed in appeal, 17 Ont. A. R. 28.

was to telegraph to the company's solicitor for instructions ; he did so telegraph, but before he received an answer, and on the same day, the vendors notified him not to deliver the goods to the vendee or his assignee, asserting a right to stop them in transitu. It was held (Falconbridge, J., dissenting) that the action of the railway company's agent in delaying till he received instructions from the solicitor was not wrongful ; that the transitus was not at an end when the vendors intervened, and the right of stoppage was well exercised.

11. It has been a much discussed point as to whether railway companies continue to be liable as common carriers after the arrival of the goods at their destination. On arrival of goods, it is customary for railway companies to give notice to the consignee or person to whom the goods are addressed, of their arrival, and that the goods will be stored and will remain at the risk of the consignee, unless taken delivery of immediately. (1) The principle seems to be generally recognized that the responsibility of the company as common carriers ceases after the goods have arrived at their destination, and a reasonable time has been given to the owner to remove them. And that after the expiration of such reasonable time, their liability as carriers would cease, and that they would thenceforward be liable as warehousemen, or bailees for hire or otherwise, as they might or might not charge for the storage of goods ; that is to say, that their liability would no longer be that of insurers, or a liability at all events, except in cases where they would prove that the loss occurred through a fortuitous event or irresistible force, but would depend upon whether they were guilty of negligence or not. In other words, if the owner or consignee of the goods chooses to leave them in the possession of the company after their arrival, it is a voluntary deposit, and the company would be only held to the diligence which is required of depositaries in such cases,—that is to say, they would be held to the care of a prudent administrator, as it is expressed in the Quebec Code. (2) The goods would remain in the hands of the company at the risk of the owner or consignee, but the company would be liable if they were injured or damaged through any want of care or negligence on the part of the com-

(1) And see Ry. Act, sec. 234.

(2) C. C. 1802.

pany. The contract of the railway company as common carriers of goods ceases on the arrival of the goods, and their only obligation thereafter is to exercise reasonable care in preserving them until called for; and if the consignee or owner, after having received notice of their arrival, neglects to take delivery within a reasonable time, there is no logical reason why the company should be held responsible for loss or damage happening to the goods without negligence on their part.

These principles may be illustrated, by the following decisions: In the case of the *Grand Trunk Ry. v. Gutman* (1), where notice of the arrival of goods had been given by the company to the consignees, and that they remained entirely at the owner's risk, and that the company would not hold themselves responsible for damage, but if stored, that a certain rate of storage would be charged, which storage was paid, the Court of Appeal for Quebec held that though the liability of the company as common carriers ceased by the arrival of the goods, they were still liable for damage as warehousemen and bailees for hire, but that the evidence did not show any negligence on the part of the railway company. This holding was by the majority of the Court, composed of Chief Justice Duval and Judges Monk and Stuart, but the minority, composed of Judges Badgley and Drummond, held that by law negligence was presumed, if damage was shown, and that the onus of proof of care was on the company, who had made no proof to rebut this presumption. The general principle laid down by the majority of the Court in this case appears to be undoubtedly correct. The only doubtful point is as to whether the burden of proof is upon the railway company to negative any presumption of negligence, or upon the owner to prove negligence on the part of the company. It would appear that the proper doctrine was that held by the majority of the Court, for while in the case of an accident upon the railway, such as the derailment of a train, there is a presumption of negligence which has to be rebutted by the company, (2) there would not be the same reason for presuming negligence in the case of loss or injury to goods when in

(1) 3 R. L. 452.

(2) *Chalifoux v. C. P. Ry. Co.*, Cassel's Dig. 749. 22 S. C. R. 721.

their possession as warehousemen. There, their liability would depend upon negligence, and the fact, for instance, of the burning of the warehouse or station building would hardly constitute a presumptive case of negligence. The plaintiff's case depending upon the negligence of the company, it would be necessary for him to make out at least a *prima facie* case, in order to recover. In other words, the plaintiff would have to show some fault on the part of the company as warehousemen, in order to maintain his action. (1)

In two earlier cases, where actions were taken to recover value of goods left at a station to be forwarded, but stored during a snow storm, it was held, notwithstanding that the company had given notice by public advertisement and otherwise that they would not be liable for damage by fire, and notwithstanding evidence that plaintiff had read one of said notices, that inasmuch as the storage of cotton waste in the building in which goods to a very large extent were stored amounted to negligence on the part of the company, they must be held liable. (2)

In an early Ontario case (3) it was held that where goods were landed from a ship at the port of destination, and notice of arrival given, the liability of the carrier ceased. In *Inman v. The Buffalo & Lake Huron Railway Company*, (4) goods were shipped from Buffalo to Caledonia for the plaintiffs, who lived at Port Dover, 18 miles from the station. Draper, C. J., held that the defendants had a right to deliver at Caledonia immediately after arrival, and, that being the terminus of the transit, their duty was fulfilled by placing the goods in a safe place, and whatever the responsibility of the company after that might be, it was not that of common carriers. Plaintiff had no right, he

(1) *Bowie v. Buffalo, Brantford & Goderich Ry. Co.*, 7 U. C. C. P. 191; *O'Neill v. G. W. Ry. Co.*, 7 U. C. C. P. 203; *Brodie v. Northern Ry. Co.*, 6 O. R. 180; *Walters v. C. P. Ry. Co.*, 1 North West Ter. 17; *Richardson v. C. P. Ry. Co.*, 19 O. R. 369; *Hogan v. G. T. Ry. Co.*, 2 Q. L. R. 142; *Kellert v. G. T. Ry. Co.*, 22 L. C. J. 257.

(2) *G. T. Ry. Co. v. Huston*, 3 L. C. J. 269. S. C. Que.; *G. T. Ry. Co. v. Mountain*, 6 L. C. J. 173, Q. B. Que.

(3) *McKay v. Lockhart*, 4 O. S. 407.

(4) 7 U. C. C. P. 325; and see *Bowie v. Buffalo, Brantford & Goderich Ry. Co.*, 7 U. C. C. P. 191; *Mason v. G. T. R.*, 37 U. C. Q. B. 163; *Hall v. G. T. R.*, 34 U. C. Q. B. 517; *O'Neill v. Great Western Ry. Co.*, 7 U. C. C. P. 203; *Mayer v. G. T. R.*, 31 U. C. C. P. 248; *Leader v. The Northern Ry. Co.*, 3 O. R. 92.

said, to continue the defendant's responsibility by delaying for a single hour after notice.

Where, however, it is the practice of the company to deliver to the consignees the goods brought by them, and the freight charges include cartage, a condition that "the company will not be responsible for any goods left until called for, or to order, warehoused for the convenience of the parties to whom they belong, or by or to whom they are consigned, and that the delivery of goods will be considered complete, and the responsibility of the company will be considered to terminate, when placed in the company's shed or warehouse," would only affect the company as carriers, and not relieve them from liability as warehousemen. (1)

Where the station was some five miles distant from the village where the plaintiff's place of business was, it was held that the station was the destination of the goods and not the village; and the railway company's liability as carriers ceased on delivery at the station. (2)

In England it has been held that where cattle arrived on Sunday about noon, and because police regulations forbade driving them through the streets on that day, the company's servants and a servant of the plaintiff's put them in a pen, and when the owner came for them on the following morning, two were found dead, the liability of the defendants as carriers ceased when they put the cattle in the pen. (3) In another case the contract was to carry goods from A. to B., to be forwarded to C. The defendants did carry the goods from A. to B., and deposited them in their warehouse, but before they had an opportunity of forwarding them, the goods were burnt. It was held, the defendants were not liable as carriers. (4) In *Chapman v. The Great Western Railway Company*, (5) where goods arrived on the 24th and 25th, and were burned on the 27th, and the defendants were held not to be liable, Coleridge, J., said: "Plaintiff cannot, for his own con-

(1) *McCrosen v. G. T. R.*, 23 U. C. C. P. 107.

(2) *Richardson v. C. P. R.*, 19 O. R. 369.

(3) *Shepherd v. Bristol & Exeter Ry. Co.*, 37 L. J. Ex. Ch. 113.

(4) *Garside v. The Proprietors of the Trent & Mersey Navigation Co.*, 4 T. R. 581.

(5) *L. R.*, 5 Q. B. D. 278.

venience, prolong the heavier liability of the carriers beyond a reasonable time."

In the United States it has been held that the mere landing and putting off the goods in their warehouse ends the liability of the carriers as such. It is a delivery by the company as carriers to themselves as warehousemen. (1)

12. A question arises as to when the disability of a company to contract away its liability for negligence under sub-sec. 3 of sec. 246 of the Railway Act, ceases—that is to say, when are the goods to be considered as "discharged"? It was held in *Scarlett v. The Great Western Ry. Co.*, (2) which was governed by a section exactly similar to the above, that this section does not extend to all cases in which negligence is charged against the railway company, but to cases only of neglect coming within the provisions of the ten preceding sub-sections. On these grounds it was decided in the recent case of *Walters v. C. P. R.*, (3) that a company can restrict its liability "for loss or damage done to goods left until called for, and warehoused for the convenience of the parties to whom they are consigned... the warehousing of all goods to be at the owner's risk and expense," and that when the goods were placed in the warehouse they were discharged within the meaning of the Act. And it was held in this case that where the goods began to arrive at their destination at about the 5th of May, and some came each day thereafter, until the last arrived, at about noon on Sunday, the 12th day of May, and a fire occurred about noon on the following day, a reasonable time had elapsed to allow the plaintiffs to remove their goods. (4)

13. The consignee must have reasonable time within which to take away the goods, and that reasonable time begins from notice or knowledge; what is notice or knowledge turns on the facts in each case, the custom of the carrier and the practice of the party

Liability as warehousemen.

Reasonable time for removal.

(1) *Norway Plains Co. v. Boston & Me. Ry. Co.*, 1 Gray 263.

(2) 41 U. C. Q. B. 211.

(3) 1 North West Territories 17, 1887.

(4) And see *Vineburg v. G. T. R.*, 13 Ont. App. 93; *Hodkinson v. The London & N. W. Ry. Co.*, L. R. 14 Q. B. D. 228, where baggage which arrived at 4.25 p.m. was called for at 6 o'clock of the same day, but could not be found. Held, that the defendants' responsibility as carriers had ceased when an opportunity was afforded the plaintiff of taking delivery of his property.

or consignee. (1) The American authorities, on the subject of notice of arrival, are very conflicting. Judge Cooley, in rendering the opinion of the Court in *Mc Millan v. Michigan Southern & Northern Indiana Railroad Company*, (2) says: "I am unable to discover any ground which to me is satisfactory, on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden." The time in general regarded as reasonable would be such as might in reason and justice be deemed sufficient for any resident of the vicinity to come for the goods with the usual appliances for cartage or drayage to be had under any ordinary circumstances. (3) The carrier's liability does not cease until the goods have been placed in a position to be handled by the consignee without unreasonable inconvenience. (4) Where, however, goods are detained by the company for payment of freight, they remain at the risk of the owners. (5)

The question as whether the consignee of goods carried as freight or a passenger taking luggage with him has, in a particular case, applied for the goods or luggage within a reasonable time after their arrival, is a question of fact to be determined in each case from circumstances. (6)

Carriers of Passengers.

Nature of
liability.

14. It has been already pointed out that there is a distinction between the liability of railway companies as carriers of passengers and as carriers of goods. (7)

As carriers of goods in the absence of special contract, they are practically insurers of the things entrusted to them for carriage; but as carriers of passengers, they are liable for injuries

(1) *Richardson v. C. P. R.*, 19 O. R. 369; *Chapman v. Great Western Ry. Co., L. R.*, 5 Q. B. D. 278.

(2) 16 Mich. 79.

(3) *Hodges v. The Railroad*, 49 N. Y. 223; *Wade on Notice*, § 577.

(4) *Hodges v. The Railroad*, 49 N. Y. 223; *The Eddy*, 5 Wall 481.

(5) *Ry. Act*, sec. 234.

(6) *Brown v. C. P. R.*, 3 Man. 496. As to passengers' luggage, see *infra*, pp. 352 *et seq.*

(7) *Supra*, pp. 295-296.

to the person carried, only when they are the result of negligence, or want of due care or skill, or reasonable foresight and prudence on the part of the carrier. This is the undoubted law in England, and in all countries where the English law prevails. (1)

In France, though it has been contended with much plausibility that the carrier's liability should *a fortiori* be as great with regard to passengers as with regard to goods, (2) the more recent decisions of the Courts there are to the effect that the liability is governed not by the Article of the Code Napoleon with regard to the carriage of goods, but by Articles 1382 and 1383, corresponding to Articles 1053 and 1054 of the Quebec Code. (3) And this has now been authoritatively decided in this country in the Supreme Court, in the case of *Chalifoux vs. C. P. Ry. Co.* (4) In that case the plaintiff was a passenger on a train which was thrown off the track by the breaking of a rail, and suffered serious injuries. The mere fact of the derailment, according to the best authorities, constituted *prima facie* evidence of negligence, on the part of the railway company, and the onus was upon them to rebut this presumption. (5) It was proved that the rails on

(1) *Christie v. Griggs*, 2 Camp. 79; *Pym v. Great Northern Ry. Co.*, 2 F. & F. 619; *Stokes v. Eastern Counties Ry. Co.*, 2 F. & F. 691; *Crofts v. Waterhouse*, 11 Moore 133, 3 Bing. 319; *Wright v. Midland Ry. Co.*, L. R., 8 Ex. 137; *Readhead v. Midland Ry. Co.*, L. R., 2 Q. B. 412, 4 Q. B. 379; *McPadden v. N. Y. Central Ry. Co.*, 44 N. Y. 478; *Ingalls v. Bills*, 9 Met. 15; *Pittsburg, etc., Ry. Co. v. Thompson*, 56 Ill. 142; *Heazle v. Indianapolis, etc., Ry. Co.*, 76 Ill. 501; *Meier v. Penn. Ry. Co.*, 64 Penn. 225; *Stokes v. Saltonstall*, 13 Pet. 181; *Bennet v. Dutton*, 10 N. H. 481; *Indianapolis Ry. Co. v. Horst*, 93 U. S. 291; *Hutchinson on Carriers*, § 500; *Hutchinson v. C. P. Ry. Co.*, 17 O. R. 347.

(2) 31 *Demolombe*, Nos. 484, 638; *Troplong*, *Louage*, Nos. 904-906; 2 *Sourdat*, Nos. 976-77; 4 *Duvergier*, *Louage d'ouvrage*, No. 317; *Dalloz*, *Rep. Vo. Commissionnaire*, Nos. 299, 301, 338, 409, 414; 2 *Cotelle*, *Législation des Ch. de Fer*, No. 203; *Dalloz*, 55-2-86; S. V. 60-2-42; *Cour Imp. Paris*, 27 Nov. 1886; but see 2 *Sourdat*, Nos. 1058 *et seq.*; 2 *Bédarride*, *Ch. de Fer*, Nos. 437, 440; S. V. 1867-2-320.

(3) *Dalloz*, 1882-2-163, 1885-1-433. It must be remarked with regard to this last case that it is stated in a note that this decision of the highest Court in France has been victoriously combated by a learned text-writer.

(4) 22 S. C. R. 721.

(5) *Christie v. Griggs*, 2 Camp. 79; *Dawson v. Man., Sheffield, etc., Ry. Co.*, 5 L. T. N. S. 682; *Burke v. Man., Sheffield, etc., Ry. Co.*, 22 L. T. N. S. 442; *Stokes v. Saltonstall*, 13 Pet. 181; *The New World v. King*, 16 How. 469; *G. W. Ry. Co. v. Braid*, 1 Moore N. S. 101; *Wood v. S. E. Ry. Co.*, 13 R. L. 567.

this particular section of the road had been manufactured upon specifications prepared by the greatest engineering authority with regard to the quality of rails to be used in a cold climate subject to sudden changes of temperature ; that the manufacturers were of the highest reputation in England ; that the rails had been there put to the severest tests possible, and were of superior quality in every respect ; that they had been again inspected and tested on their arrival in this country, and had been laid with great care ; that the roadbed was in perfect order, and that the piece of track itself had been inspected twice on the same day previous to the accident, and for the last time within twenty minutes of the breaking of the rail. It was also shown that the temperature had been very low for some days previous to the accident, and that on the day of the accident it had suddenly risen considerably. It was also proved that such a change of temperature, resulting in a contraction and sudden expansion of the metal, was the most frequent cause of the breaking of rails: Judge Mathieu, in the Superior Court, in a very learned judgment, held that, notwithstanding that they had clearly absolved themselves from any imputation of negligence, the railway company were liable for the injuries to the plaintiff under the provisions of Art. 1675 of the Code with regard to carriers, and that they could not be excused from such liability unless they proved that the accident was caused by *cas fortuit* or *force majeure*, and that the breaking of the rail by a change of temperature did not constitute such a case, but was a thing which could have been foreseen. (1) This judgment was confirmed by the Court of Appeals, Judge Cross dissenting, (2) but was reversed by the Supreme Court, (3) where it was held by the majority of the Court (Fournier, J., dissenting) that the railway company could only be held liable as carriers of passengers in case of negligence, and that whether the onus was upon the plaintiff or defendants, the company in this case had clearly rebutted any presumption of negligence which might have arisen from the fact of the derailment having occurred. The dissenting opinion in this case was based on the ground that the evidence showed there was a latent

(1) M. L. R., 2 S. C. 171, 14 R. L. 149.

(2) 31 L. C. J. 261, M. L. R., 3 Q. B. 324.

(3) *Supra*, p. 323.

defect in the rail, and that the liability of the company was the same as that imposed upon them as carriers of goods. In the Court of Appeal the opinion of the learned Chief Justice (*Sir A. A. Dorian*) seems to have been founded upon the fact that, in his view of the evidence, the rail must have been broken some days before the accident, and that the company were therefore guilty of negligence in not having replaced the rail.

In a still more recent Quebec case (1) the question was again fully argued before the Supreme Court, and decided in the same sense as the *Chalifoux* case, with the same dissent, reversing the judgments of the two courts below. (2) In that case, however, the Chief Justice of the Court of Appeals (*Sir Alexander Lacoste*) seems to have based his opinion on the ground of negligence on the part of the company, as will be seen from his remarks, as follows: "Le voiturier est tenu d'user de la plus grande vigilance pour protéger ses passagers contre les périls du voyage *** Si, par sa négligence, il commet un voyageur à quelqu'inconvénient, il doit s'attendre que celui-ci prendra les moyens que sa discrétion lui suggérera pour se tirer d'embarras, *** et le voiturier sera responsable de l'accident qui surviendra, à moins qu'il ne prouve que le voyageur a agi avec une imprudence inexcusable." (3)

The views thus expressed are certainly irreconcilable with the doctrine as to carriers of goods, which if applied to passengers would make the carrier liable without any question as to his negligence.

15. It was well said by the learned Chief Justice, that the carrier Degree of is held to the greatest vigilance in protecting his passengers. care. While he is not held to warrant or insure the safety of the passenger at all events, he is bound to convey him safely, "as far as human care and foresight will go." (4) While this does not mean that the carrier is bound to use all the means that human skill or ingenuity can devise, (5) it implies the exercise of all

(1) *Quebec Central Ry. Co. v. Lortie*, 22 S. C. R. 336.

(2) *Que., Q. B.*, not reported in Quebec reports.

(3) 22 S. C. R. at p. 345.

(4) *Christie v. Griggs*, 2 Camp. 79; per Lord Mansfield.

(5) *Indianapolis Ry. Co. v. Horst*, 93 U. S. 291; *Ford v. Lon. & South Western Ry. Co.*, 2 F. & F. 730.

reasonable skill and care, (1) and he is bound to use the most exact diligence, and is responsible for negligence however slight. (2) Yet, though the carrier is bound to use all well known appliances and machinery, generally used, he is not bound to put in practice experimental or untried machinery or methods which may have been invented, especially where the cost or difficulty of working them would be disproportionate to the greater degree of safety to be obtained. (3)

Latent defects
in vehicle or
roadbed.

16. In England many decisions have gone upon the question as to whether the carrier is responsible for damages arising from latent defects, the general doctrine appearing to be that as the liability of the carrier of passengers depends upon his negligence or otherwise, he would not be held liable on account of an accident arising from a latent defect in some part of the roadbed, carriage or machinery which could not be perceived by the most careful inspection, provided it were shown that such an inspection had been duly made. (4)

In *Redhead v. Midland Railway Company*, Lord Blackburn went so far as to say that the carrier is bound to supply not a perfect vehicle, but one reasonably sufficient for the journey, and that it is not enough that every reasonable effort was made to secure this result, if in fact the carriage was not sufficient. (5) In the Exchequer Chamber, however, it was unanimously held the contract of carriage implies no warranty as to the sufficiency of the vehicle, but is only to take "due care" of the passenger. (6)

Exceptions to this doctrine, however, have been taken, one where the carrier is himself the manufacturer of the carriage or

(1) *Wright v. Midland Ry. Co.*, L. R., 8 Ex. 137.

(2) *Daniel v. Metropolitan Ry. Co.*, L. R., 3 C. P. 216, 591; and see *Foy v. Lon., Brighton & South Coast Ry. Co.*, 18 C. B. N. S. 225; and *Gee v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 161.

(3) *Hutchinson on Carriers*, § 529-30, and see *Steinweg v. Erie Ry. Co.*, 43 N. Y. 123; *New Orleans & C. Ry. Co. v. Faler*, 58 Miss. 911; *Le Barron v. E. B. F. Co.* 11 Allan 312; *Natchez & C. Ry. Co. v. McNeil*, 61 Miss. 434.

(4) *Redhead v. Midland Ry. Co.*, L. R., 2 Q. B. 412, 4 Q. B. 379; *Wright v. Midland Ry. Co.*, L. R., 8 Ex. 140; and see *Francis v. Cockerell*, L. R., 5 Q. B. 184; *Exch. Cham.* 501; and *G. W. Ry. Co. v. Braid*, 1 Moore N. S. 101; *Ingalls v. Bills*, 9 Met. 1; *Hutchinson on Carriers*, § 506-507.

(5) L. R., 2 Q. B., at p. 412.

(6) L. R., 4 Q. B. 379.

the machinery. In such a case it has been generally held that the carrier is responsible for such a latent defect or flaw as being the result of his own negligence in construction; but, on the other hand, where the defect occurs in a portion of the carriage or machinery which has been made by the best manufacturers with due care or skill, and according to the most approved principles, and subject to proper tests and inspection, it has been held that the carrier is not liable for consequent damage or injury, but is liable if the proper tests and inspection have not been made by the manufacturer, where such tests would have revealed the defect, even though they might be such tests as could not be applied by the carrier himself whose duty is to see that the work is properly done by the manufacturer. (1) As it was put by Hannen J., in *Francis v. Cockerell*, (2) "unless the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is, by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected, and whose breach of contract caused the mischief. But not only do we think that, when the reasons of justice and convenience on the one side and on the other are weighed, the balance inclines in favor of the plaintiff (passenger), but we are also of opinion that the weight of authority is on the plaintiff's side."

17. The leading case as to the degree of care and skill required from railway companies in the construction and maintenance of the roadbed, embankments, etc., is that of *Great Western Railway Company v. Braid* (3), decided by the Privy Council on an appeal from Ontario (4) in 1863. Their Lordships there held that:—

(1) *Redhead v. Midland, L. R.*, 2 Q. B. 412, 4 Q. B. 379; *Francis v. Cockerell, L. R.*, 5 Q. B. 184, Exch. Cham. 501; *Grote v. Chester & Holyhead Ry. Co.*, 2 Exch. 251; *Crofts v. Waterhouse*, 3 Bing. per Best C. J. at p. 321; *Brazier v. Polytechnic Institution*, 1 F. & F. per Wightman J. at p. 508; *Hegeman v. The Ry. Co.*, 13 N. Y. 9; *Hutchinson on Carriers*, §§ 509-512; but see *Nashville & Decatur Ry. Co. v. Jones*, 9 Heisk. 27.

(2) *L. R.*, 5 Q. B. at p. 194.

(3) 1 Moore N. S. 101.

(4) 10 U. C. C. P. 137.

"Where an injury is alleged to have arisen from the improper construction or maintenance of a railway, the fact of one of its embankments giving way will amount to *prima facie* evidence of such insufficiency; and this evidence may become conclusive, in the absence of any proof on the part of the company to rebut it." (1)

In an action against a railway company for damages sustained by reason of want of skill in the construction of the railway, the fact that the accident was caused by a storm of such an extraordinary nature, that no experience could have anticipated its occurrence, is a circumstance that, as affecting the question of negligence in the construction and maintenance of the railway, ought to be left by the judge distinctly and pointedly to the jury. (2) In this case, their Lordships remarked that the difficulty of extracting any principle from decided cases, which may be applied with certainty to questions of this description, is strongly exemplified by the two judgments of the Court of Exchequer in *Withers v. The North Kent Railway Co.*, (3) and *Ruck v. Williams*, (4) rendered within three weeks of each other. (5)

Their Lordships, however, while disclaiming any attempt to lay down any general rule upon the subject, said that the railway company ought to have constructed their works in such a manner as to have been capable of resisting all the violence of weather which, in the climate of Canada, might be expected, though perhaps rarely, to occur. (6)

The rule laid down by their Lordships, however, seems broad enough to cover most cases of this nature arising in this country.

Crown as
carrier.

18. The Crown is not liable as a common carrier for the safety and surety of passengers using its railways; and a petition of right does not lie against the Crown for injuries resulting from the non-feasance or mis-feasance, wrongs, negligence, or omis-

(1) Per Lord Chelmsford at p. 116. See also two Quebec cases to same effect, *Wood v. South East Ry. Co.*; *Murray v. South East Ry. Co.*, 13 R. L. 567.

(2) 1 Moore N. S., 101.

(3) 27 L. J. N. S., Exch. 417.

(4) 27 L. J. N. S., Exch. 357.

(5) 1 Moore, N. S., per Ld. Chelmsford, at p. 116.

(6) Per Ld. Chelmsford, at p. 120.

sions of duty of the subordinate officers or agents employed in the public service on its railways. (1)

19. The degree of care due by the carrier to strangers is governed by the principle that everyone is obliged, upon considerations of humanity and justice, to conform his conduct to the rights of others, and, in the prosecution of his lawful business, to use every reasonable precaution to avoid injuring them. (2) In a Quebec case, (3) where a person, by giving a tip or bribe to the conductor of a train not intended for the conveyance of ordinary passengers, as he had reason to know, induced the conductor of such train to permit him to travel on the train, contrary to the regulations of the company, it was held that he travelled at his own risk, and if while so travelling, he is injured by a collision, he is not entitled to be indemnified by the company for any damage to person or property sustained by him. Where the defendants are negligent in the manner of running a train, they are liable for the death of an express messenger, who, as such, was being carried on their train without a ticket or payment of fare, but under a contract between the defendants and the express company. (4) The deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company.

Where the plaintiff was a servant in the employment of a contractor with defendants for keeping their road in repair, and, in the course of such repairs, plaintiff was transported on the defendant's cars under the management of defendant's servants, and used to transport materials and convey workmen employed by the contractor; the defendants were held liable to plaintiff for injuries negligently caused to him by the collision of the train with another. (5)

(1) *The Queen v. McLeod*, 8 S. C. R. 1.

(2) *Hutchinson Carriers*, Ed. 1882, p. 447.

(3) *Canadian Pacific Railway Co. v. Johnson*, M. L. R., 6 Q. B. 213; and see *Hutchinson v. C. P. R.*, 17 O. R. 347. Confirmed in appeal, 16 Ont. A. R. 429.

(4) *Jennings v. The Grand Trunk Railway*, 15 Ont. A. R. 477. This case was confirmed on appeal to the Privy Council on the question of damages, 13 App. Cas. 800. For the case of a mail carrier, see *Nolton v. The Railroad Corporation*, 15 N. Y. 444.

(5) *Torpy v. The Grand Trunk Railway Co.*, 20 U. C. Q. B. 446; but see *Sheerman v. Toronto, Grey & Bruce Ry. Co.*, 34 U. C. Q. B. 451.

Two other cases, similar to the foregoing, were afterwards decided in a contrary sense, but the facts differed sufficiently to warrant a departure, without in any way disturbing the soundness of the first decision. In one of these cases (1) the evidence shewed that the defendants were only bound by their contract with the contractors to provide an engine and platform cars for carrying ballasting and materials for track-laying, to be under the charge of their own conductor, engineer and fireman, the contractors to find the brakeman; and that it was not necessary for defendants to carry the workmen. There was no evidence that the defendants consented to the use of the cars by the men, further than that the conductor and engine-drivers permitted it. In the other case (2) the facts were exactly similar, and it was held that the defendants were not liable, for their contract was to carry materials only, not passengers, and the conductor, in permitting the plaintiff to get upon the train, was not acting as defendant's agent. The distinction to be noted between these two cases and that of *Torpy v. The Grand Trunk Railway Company*, is, that in that case the contract was for the repairing of the line, and not for construction, and the train was entirely under the control of the defendants. It might, therefore, be readily supposed that, owing to the nature of the contract, the workmen would require to be transported from place to place by the company's trains.

Riding in unauthorized place.

20. With reference to regulations prohibiting persons from riding on the platforms of cars or in baggage or freight cars, reference should be had to sections 214 to 222 of the Act. The first section empowers the company to make by-laws, rules or regulations for the purpose therein mentioned, and amongst others, those for the purposes of regulating the travelling upon or the using or working of the railway; and by the following sec. 215, the company is given power to prescribe a penalty not exceeding \$40 for the violation of any by-law or regulation. Such by-laws and regulations are subject, by sec. 217, to the approval of the Governor in Council, without which they have no force or effect. Sec. 218 provides for the publication of such by-laws or regulations,

(1) *Sheerman v. Toronto, Grey & Bruce*, 34 U. C. Q. B. 451.

(2) *Graham v. Toronto, Grey & Bruce*, 23 U. C. C. P. 541.

and requires that printed copies should be openly affixed and kept affixed to a conspicuous part of every station belonging to the company, and so as to give public notice thereof; and in the Province of Quebec, it is required that they should be printed both in French and English; and when approved as above mentioned and published, they are binding upon all persons; and by sec. 221, the company is given power in cases where the violation or non-observance of any by-law or regulation would be attended with danger or annoyance to the company, or hindrance to the company in the lawful use of the railway, to summarily interfere without prejudice to the penalty. When such by-laws or regulations affect the officers or servants of the company, it is required by sec. 219 that a printed copy shall be given to every officer, servant and employee of the company affected. It would appear from consideration of sec. 249 taken in connection with those sections referring to by-laws and regulations, that a passenger riding upon the platform of a passenger car or in a baggage or freight car, in violation of any regulation of the company, approved of by the Governor General in Council, and published in the manner required by the Act, (1) would not be entitled to receive compensation if injured, provided that sufficient accommodation was provided for him in the car. Aside, however, from any regulations upon the subject issued by the railway company, and properly published, it is always competent to show, in defence to an action for bodily injuries, that the party injured was knowingly travelling in an unauthorized place; and if the passenger wilfully and knowingly puts himself in a place of danger, and an accident results to him which would not have occurred if he had been riding in the ordinary passenger car, there is no doubt he could not recover for the consequent injury. (2) To take an extreme case, we might suppose that the passenger seated himself upon the cow-catcher of the engine; very clearly he would take upon himself the result of any injury resulting to him from riding in such an exposed position. Where the

(1) Under the Provincial Railway Acts, printed regulations must be posted up at the time in a conspicuous place inside the passenger cars forming part of the train. (See Appendix CXL.)

(2) Railroad Co. v. Jones, 95 U. S. 439; Eaton v. The Railroad, 57 N. Y. 382; C. P. Ry. Co. v. Johnson, M. L. R., 6 Q. B. 213; Hutchinson v. C. P. Ry. Co., 17 O. R. 347; 16 A. R. 429; Hutchinson on Carriers, § 554.

conductor of a freight train, contrary to the rules of the company, travelled upon the locomotive while in charge of the train, and a collision occurring, he was killed, the company were held not liable. (1)

Where the plaintiff, who was in defendant's train on a passenger ticket, went into the baggage car, where passengers frequently went to smoke with the permission of the conductor, and was injured while in the baggage car by a collision resulting from defendant's gross negligence, it was held that he could recover. (2) It was also held that sec. 107 Consolidated Statutes Canada (reproduced in the present Railway Act) (3) did not apply. Although the car was in sense a baggage car, yet the compartment in which plaintiff was at the time of the accident was used by the express company, the other two compartments being used for the post office and the baggage.

To recover in an action for damages resulting from injuries received while being carried, the injured party must be lawfully upon the train; and if he obtains admission to the train, and is carried, under false representations or through fraud on his part, or by the use of a ticket or pass unlawfully obtained, he cannot recover. (4)

Duty of Railway servants in charge of train.

21. It has been observed (5) that it is not the duty of carriers to restrain passengers from injuring themselves; at the same time, it is undoubtedly the duty of conductors and others in charge of the train to see to the proper and safe placing of passengers, and as far as possible to prevent them from occupying dangerous positions on the train. This principle was very strongly brought out in a case which came before the Quebec Court of Appeals, one of a series of actions brought against the C. P. Ry. Co., by a number of workmen who were being carried over the line to a point where they were to obtain work. They were not carried upon a regular passenger train, but upon a train made up of various cars, some empty, some flat cars carrying rails, and some

(1) *Stoker v. The Welland Railway*, 13 U. C. C. P. 386.

(2) *Watson v. Northern Ry. Co.*, 24 U. C. Q. B. 98.

(3) Sec. 249.

(4) *C. P. Ry. Co. v. Johnson*, M. L. R., 6 Q. B. 213; *Great Northern Ry. Co. v. Harrison*, 10 Exch. 376; *Hutchinson on Carriers*, § 555.

(5) *Browne on Carriers*, 385.

cars loaded with lumber. The Court held that the plaintiffs occupied the position of passengers with regard to the railway company, as carriers of them. The men were directed to take their seats upon the flat cars, but instead of doing so, climbed upon the top of the lumber on several cars. The lumber was proved to have been staked at the side sufficiently to hold it, but at a certain point on the road, where an unusual jerk or jolt occurred, the lumber was thrown off through the breaking of the stakes, which would not have occurred had it not been for the superadded weight of the men and their baggage. The company were held liable, upon the ground that the conductor and the servants in charge of the train should have exercised more supervision over the passengers, and not merely contented themselves with originally directing them to take their seats upon the empty cars, but were bound to have ordered them out of the dangerous position which they took up. (1) This case may be of doubtful authority, as one of the learned Judges expressed grave doubts; but it serves as an illustration to show how jealously the courts will guard the rights of passengers in such cases.

There is a duty imposed also upon the railway company to protect the passenger from the unlawful acts of other passengers, when practicable, and within the power of the company's servants. (2)

22. Platforms are generally considered as convenient accommodation for passengers to alight at stations. As no law, however, compels railway companies to have them erected at every station, they are not held absolutely necessary; but in their absence, it seems that something else should be provided, or such care and assistance procured as to insure the safe alighting of passengers from the trains. (3)

So in another case, where the train arrived at the station on a dark night, and the station grounds were not lighted, and there was no platform on which to alight, but the ground was smooth and level, a brakeman came with a lantern, carried out the plain-

(1) *C. P. Ry. Co. v. Goyette*, M. L. R., 2 Q. B. 370.

(2) *Hutchinson on Carriers*, §§ 548-552.

(3) *Dubuc, J.*, in *McGinney v. C. P. Ry. Co.*, 7 Man. 153. For a point involving the introduction of evidence in such a case see *Harvey v. C. P. R.*, 3 Man. 266.

Alighting
from trains at
stations.

tiff's valise and assisted her to alight. The lowest step of the carriage was 26 inches from the ground. Before assisting her to alight, the brakeman placed the lantern on the ground where it cast a light 20 or 30 feet around. In alighting the plaintiff injured her knee, and was compelled in consequence to abandon her employment as cook. It appeared at the trial that the plaintiff's knee had been weak for some time previously, and that she had been affected with synovitis in a sub-acute form. She did not tell the brakeman of this weakness of the knee. In an action brought for this injury it was held that the defendants were not guilty of negligence, and that if there was any negligence at all it was attributable to the plaintiff in not telling the brakeman of her feeble and delicate knee. (1)

But where, after calling out the name of a station, a railway train was slowed up on approaching and passing it, but was not brought to a full stop, and the plaintiff who had purchased a ticket for that station received injuries on alighting there, it was held, that there was evidence of an invitation to alight, and that it was for the jury to say whether she had acted in a reasonably prudent and careful manner in availing herself of it. (2)

In England the doctrine is that if the servants of the company ask passengers to alight on arrival of a train at a station, the company is liable for injuries sustained in alighting, owing to defective accommodation of the place ; but what amounts to an invitation to alight depends upon the surrounding facts and circumstances. And it has been held that mere stoppage of the train and calling out the name of the station is not such an invitation ; (3) but, coupled with a lengthened stoppage, would amount to an invitation, (4) as may a long stoppage alone. (5)

In *Bridges v. North London Ry. Co.*, (6) in the House of

(1) *McGinney v. The Canadian Pac. Ry. Co.*, 7 Man. 151; and see *Crafter v. The Metropolitan Co.*, L. R., 1 C. P. 300; *MacDonald v. Mayor, etc., of St. John*, 25 N. B. 318; *Siner & wife v. The Great Western Ry. Co.*, L. R., 3 Ex. 150; *Harrold v. The Great Western Ry. Co.*, 14 L. R. N. S. 440; *Cornman v. The Eastern Counties Ry. Co.*, 4 H. & N. 781.

(2) *Edgar & wife v. The Northern Ry. Co.*, 11 Ont. App. 452.

(3) *Lewis v. Lon. Chat. & Dover Ry. Co.*, L. R., 9 Q. B. 66.

(4) *Bridges v. N. Lon. Ry. Co.*, L. R., 7 H. L. 213; *Robson v. N. E. Ry. Co.*, 2 L. R., 2 Q. B. D. 85.

(5) *Rose v. N. E. Ry. Co.*, L. R. 2 Ex. D. 248.

(6) *Bridges v. Directors, etc., of North London Ry. Co.*, L. R., 7 H. L. 213.

Lords, it was held that the case was one for the consideration of the jury. It was laid down in this case as a test for what is or is not for the jury, that there is in every case of this kind a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury, and direct a non suit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant, (1) and it follows from this that although the question of negligence is usually one of pure fact, and therefore for the jury, it is the duty of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case ; and if the facts proved by the plaintiff do not, whatever view can be reasonably taken from them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration. (2) In a Quebec case, (3) it was decided that where a passenger buys a ticket for a certain station, and the company collect it, they are bound to put him off at that station, or be held liable in damages ; but where the company have failed to so stop, and the passenger jumps from the train while it is in motion, the company will not be held liable for injuries received by the passenger, they being solely the result of his own imprudence.

A railway company is bound to provide for passengers safe means of ingress to and egress from its stations. And where a passenger, arriving at a station, at night, walked along a platform not intended for, but frequently used as, a means of exit, but which was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds, and was injured, the company were held liable. (4)

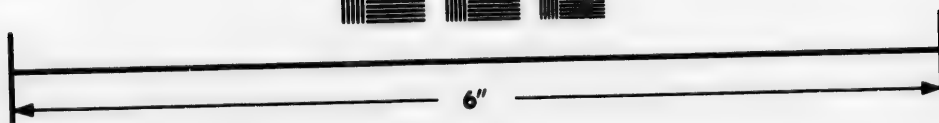
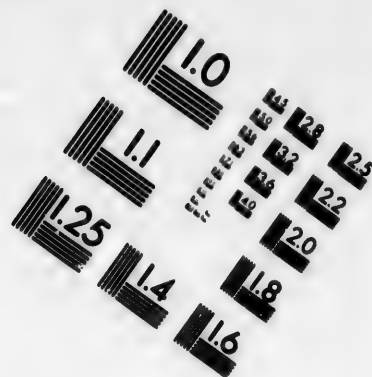
The company is also bound to keep its station and premises in proper repair, so as to prevent injuries to passengers ; and a

(1) Per Pollock B. in *Bridges v. Directors, etc., of North London Ry. Co.*, L. R., 7 H. L. at pp. 221-222, quoting from *Ryder v. Wombwell*, L. R., 4 Ex. 32, 38.

(2) *Ibid.*

(3) *The Central Vermont Ry. Co. v. Lareau*, M. L. R., 2 Q. B. 258, reversing M. L. R., 1 S. C. 433.

(4) *Oldwright v. G. T. Ry. Co.*, 22 Ont. A. R. 286.



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passenger arriving at the station continues to be a passenger for a reasonable time until he has left their premises. So, too, a person *bona fide* at the station, for the purpose of taking passage upon a train, is a passenger, although he has not in fact purchased his ticket. (1) The company is bound, as to its passengers or persons upon its premises "by invitation," to see to it that its premises are in such a condition, in all respects, that a person, by the exercise of ordinary care, can come to and leave them without danger; and this extends to proper and suitable approaches, platforms, steps or other devices, as well as suitable lights. (2)

As illustrating the obligation of the railway company in this respect, and the care to be exercised by the passenger, the following case may be cited. The approach to a station of the Grand Trunk Railway from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass around the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go around the rear, when he was struck by a shunting engine, and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. It was held that the company neglected no duty which it owed to the deceased as one of the public. (3) And per Strong & Patterson, J.J., that while the public were invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied warranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass around a train in motion.

(1) Wood, Railway, 1163; Grand Trunk Railway v. Boulanger, 17th March, 1886 (Que.), Cassil's Dig., p. 734.

(2) Wood, Railways, 1164.

(3) Jones v. The Grand Trunk Ry. Co., 18 S. C. R. 696, affirming Ct. of Appeals, Ontario, 16 Ont. App. 37; see also Curwin v. The Windsor & Annapolis Ry. Co., 3 Geld & Oxley 493.

23. While generally an attempt to get on board a train in motion will be treated as evidence of negligence on the part of the passenger, yet instances may exist where it is not so, and the passenger is justified in making the attempt; but in such cases liability arises, if at all, because of the fact that the danger was not obvious, or because the agents of the company directed the passengers to make the attempt. But even where the agents of the company direct the passenger to do so, the company is not liable, if it was gross negligence on the part of the passenger to make the attempt in view of all the circumstances; and whether it was so or not depends upon the fact whether, under the circumstances, the act was obviously dangerous, and that is a question for the jury. (1) A passenger, in trying to catch a train, ran up and seized hold of the iron railings of one of the cars, and holding thereon, ran along the platform at the speed of the train with his face towards the car, and, after the train had moved a certain distance, in attempting to jump thereon, he struck against a baggage truck which was close to the platform, and which had been used in taking baggage to the baggage car, and was left for a couple of minutes to bring back the baggage therefrom. By the concussion he was thrown under the wheels of the train, and received an injury. It was held that, under the circumstances of the case, the leaving of the truck on the platform did not constitute negligence on the part of the defendants; but even if it did, the plaintiff, in attempting to get on the train, as he did, was guilty of such contributory negligence as would prevent his recovering. (2)

An important case on this point was that of *Hall v. McFadden*, decided in the Supreme Court of Canada. (3) Plaintiff, having a first-class ticket from Sussex to Penobsquis by the Intercolonial Railway, intended going to Penobsquis (her home) by the mixed freight and passenger train, which was due to leave Sussex at 1.47 p.m. The train on that day was an unusually long one, and when the passenger cars were brought to the platform, the engine was across the public highway. When the train came in it was brought up so that the forward part of the first-class car was

(1) Wood Rlys., p. 1154; Curry v. C. P. R., 17 O. R. 65.

(2) Haldan v. The Great Western Ry. Co., 30 U. C. C. P. 89.

(3) 1st May, 1883. Cassel's Dig., p. 724.

opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was standing on the platform when the train came in, but did not then get on board. The conductor of the train (the defendant) got off the train and went to a hotel for dinner. While he was absent the train was, without his knowledge, backed down, so that only the second-class car remained opposite the platform. The jury found that the first-class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after finishing his dinner, came over hastily (being behind time and, therefore, in somewhat of a hurry), called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track), and almost immediately the train started. The 124th regulation for government of the Intercolonial Railway prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which was not done in this instance. Plaintiff and a lady friend, F., who was going by the same train, were standing on the platform, and when they heard the call "all aboard," they went towards the car as quickly as they could. F. got on all right, but plaintiff, who had a paper box in her hand, caught the hand-rail of the car, when she slipped, owing to the motion of the train, and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board.

The Supreme Court of New Brunswick (1) held, that, although the plaintiff's contract was with the Crown, the defendant owed to her, as a passenger, a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury. On appeal to the Supreme Court of Canada, it was held (2) that the judgment of the Court below should be affirmed. It was held by Ritchie, C. J., that there was no obligation on the part of the passengers to go on board the train until it was ready to start, or

(1) 19 N. B. 340, and 21 N. B. 586.

(2) *Taschereau v. Gwynne*, J. J., dissenting.

until invited to do so by the intimation from the conductor "all aboard." And by Henry, J., that there was no satisfactory proof of contributory negligence on the part of the plaintiff. The package she carried was a light one, and such as is often carried by passengers with the knowledge and sanction of railway conductors and managers, and a tacit license is therefore given to passengers to carry such with them in the cars. After the notification "all aboard" is given by a conductor, it is his duty to wait a reasonable time for passengers to get their places.

24. The railway company is bound to use every reasonable effort to insure punctuality in the starting and arrival of its trains, and any unreasonable delay will render the company liable in damages to the passenger, to be measured as a rule by the inconvenience he thereby suffers, and any additional expenses he incurs, within reason, to reach his destination. (1)

The ruling case in England is that of *Le Blanche v. The London & North Western Railway Company*. (2) There the plaintiff contracted in Liverpool for a journey to Scarborough *via* Leeds, having taken a ticket expressed to be subject to conditions in the time tables, which were (*inter alia*): "Every attention will be paid to ensure punctuality as far as is practicable; but the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention." According to the time bills the train which left Liverpool at 2 o'clock was to arrive at Leeds at 5 o'clock, and a train was to leave Leeds at 5.20, arriving at Scarborough 7.30. The trains between Leeds and Scarborough were not under control of the contracting company. The train, being delayed at St. Helen's Junction and Manchester, arrived at Leeds at 5.27, after the 5.20 train from Scarborough had left. There was another train at 8 p.m. which would arrive at Scarborough at 10 p. m.

(1) *Hobbs v. Lon. & N. W. Ry. Co.*, L. R., 10 Q. B. 111, 44 L. J. Q. B. 49; *Le Blanche v. Lon. & N. W. Ry. Co.*, L. R., 1 C. P. D. 286, 45 L. J. C. P. 521; *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408, 26 L. J. Ex. 20.

(2) L. R., 1 C. P. D. 286, 45 L. J. C. P. 521 (C. A. 1876).

The plaintiff ordered a special train to Scarborough at a cost of £11.10s., and arrived there at about 8.45. He brought an action in the County Court to recover the £11.10s. The judge of the County Court gave judgment for the amount claimed.

This judgment was affirmed by a Divisional Court of the Common Pleas division, who held, first : that the facts and documents which formed the contract were the taking and granting of the ticket, the time table and the conditions ; secondly, that the defendants thereby contracted to make every reasonable effort to secure punctuality ; thirdly, that although a delay of a few minutes would not be evidence of a want of reasonable effort, yet a long unusual delay, such as had occurred at St. Helen's Junction and at Manchester, was evidence calling upon the company to show that it arose in spite of such reasonable effort, and that there was evidence that such delay was the cause of the plaintiff's missing the corresponding train at Leeds ; fourthly, that the cost of the special train was recoverable as damages.

On appeal, the judgment of the court below was, on the first point, affirmed ; on the second, affirmed (dissentiente, Cleasby, B.) ; on the third, affirmed (dissentiente, Baggallay, J. A.) ; and on the fourth, reversed.

In *Denton v. Great Northern Railway Company*, (1) it was held that the publication by the defendant's company in their time tables of a train on another line was a promise by the defendants to a person travelling by their line, and intending to go on, that there was such a train as advertised. In *Great Northern Railway Company v. Hawcroft*, (2) the plaintiff bought a ticket which read : "Barnsley to London and back, excursion ticket. To return by the trains advertised for that purpose on any day not beyond 14 days from the date hereof." The plaintiff presented himself on a Saturday within the 14 days at the London station in time for the morning return train. He was crowded out, and the defendants refused to let him proceed by an ordinary train. He had to wait till the evening train which took him to Doncaster, from which there was no other service to Barnsley on that day. The plaintiff hired a carriage from Don-

(1) (1856) 5 El. & Bl. 860, 25 L. J. Q. B. 129.

(2) (1852) 21 L. J. Q. B. 178.

caster to Barnsley, and was held entitled to recover the expenses incurred.

In *Buckmaster v. Great Eastern Railway Company*, (1) the plaintiff recovered the cost of a special train and damages for loss of market under the following conditions: He was a miller, and held a season ticket between Framlington and London, and used to go to the Mark Lane corn market twice a week by a train which departed at 6.45 a.m., and reached London at 10.40, in time for him to catch the market at 11. On the occasion in question, the train, through negligence of the company's servants, was not ready to leave Framlington anywhere near the time advertised. He obtained a special train, but nevertheless missed the market.

In *Fitzgerald v. Midland Railway Company*, (2) it was held that where a passenger fails to catch a train on the line of a company by reason of the ordinary train being delayed through no fault of the company, he is not entitled to have a special. In that case flood was the cause of the delay. In *Thompson v. Midland Railway Company*, (3) a similar decision was given where the delay arose from the negligence of other companies.

The general rule governing such cases would appear to be best stated by Brett, J., (4) glossing the language used by Alderson, B., in *Hamlin v. Great Northern Railway Company*, (5) as follows: "We think it may properly be said that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing;"—and by Blackburn, J., in *Hobbs v. London & South Western Railway Company*, (6) who there said: "Where there is a contract to supply a thing, and it is not supplied, the damages are the difference between that which ought to have been supplied, and that which you have to pay for, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing you ought to have had and the best

(1) (1870) 23 L. T. 471.

(2) (1876) 34 L. T. 771.

(3) (1875) 34 L. T. 34.

(4) In *Le Blanche v. Lon. & N.W. Ry. Co.*, L. R., 1 C. P. D. at pp. 302-3.

(5) 1 H. & N. 408, 26 L. J. Ex. 20.

(6) L. R., 10 Q. B. at pp. 119-20.

"substitute you can get upon the occasion for the purpose."
 * * * "Now, as I have said, what the passenger is entitled to
 "recover is the difference between what he ought to have had
 "and what he did have; and when he is not able to get a con-
 "veyance at all, but has to make the journey on foot, I don't
 "see how you can have a better rule than that which the learned
 "judge gave to the jury here, namely, that the jury were to see
 "what was the inconvenience to the plaintiffs in having to walk,
 "as they could not get a carriage."

The learned judge, however, held that no damages could be allowed on account of the female plaintiff having caught cold while walking home, as being too remote. (1)

Limiting
liability.

25. There is no doubt that in regard to regular passengers the company cannot relieve itself by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants. (2) But the question arises as to the company's liability, and its power to limit the same, towards those who are travelling under special contract, such as on a free pass or at reduced rates, or in some special capacity on the cars. In a somewhat early Ontario case, (3) it was held that where a person was travelling on a free pass, upon the condition that he should assume the risk of accidents and damage, his heirs could not recover damages for his being killed by the giving way of a bridge over which he was passing in the train. (4) There is no doubt that the general tenor of the English law is to the same effect, (5) but it has often been held otherwise in the United States. (6)

In *Duff v. Great Northern Railway Company*, (7) Palles, C. B., wished it to be observed that his judgment was based upon the fact that the person who actually travelled (as a drover) was

(1) But see *Toronto Ry. Co. v. Grinstead*, 24 S. C. R. 570; and *Thompson, Carriers of Passengers*, 566.

(2) Sec. 246, sub-sec. 3.

(3) *Sutherland v. The Great Western Ry. Co.*, 7 U. C. C. P. 409.

(4) But see *Woodruff v. G. W. Ry. Co.*, 18 U. C. Q. B. 420.

(5) *McCawley v. Furness Ry. Co.*, L. R., 8 Q. B. 57; *Duff v. The Great Northern Ry. Co.*, 4 Ir. Law Rep. 178; *Gallin v. London & North Western Ry. Co.*, L. R., 10 Q. B. 212; *Hall v. North Eastern Ry. Co.*, L. R., 10 Q. B. 437.

(6) *Fedfield*, Vol. 2, p. 236, note c. *Hutchinson*, § 583-24.

(7) 4 Ir. Law Rep. 178.

the person who signed the contract. (1) Had he been a different person, the connection of the drover with the contract might have involved a question of fact, and this might have been for the jury. This passage from the judgment of the learned Chief Baron would seem to throw doubt upon the holding in an Ontario case (2) involving this point. In this case *C. & Co.*, news dealers, made a contract with the defendant company whereby they should carry *C. & Co.*, their news boys and agents on their trains, the company to be exempted from all liability for any injury to the persons or property of said *C. & Co.*, their news boys and agents, whether occasioned by defendant's negligence or otherwise. Alexander, one of the news boys, while lawfully standing upon the platform of one of the company's stations, was struck by a piece of timber, which had been loaded so carelessly as to project over the platform. As the result of his injuries, he died. It was held that the administrator could not recover. That deceased must be taken to have accepted the terms on which the company agreed to carry him, whether aware of its terms or not. Draper, C. J., of appeal, however, dissented, and, we think, rightly.

It is to be noticed in this case that the fact of the injury occurring off the train would not alter the company's liability. Where the company can exempt themselves from liability, such exemption extends not only during the actual transit on the railway, but whilst the passenger is upon any part of the railway company's premises. (3)

26. Mere notices to the passenger are no more effectual for the purpose of limiting the liability of the carrier of passengers than of the carrier of goods; and where a document is complete on the face of it, but having on the back of it something which has not been brought to the knowledge of a contracting party, he cannot be held to have assented to that which he has not seen and of which he knows nothing. (4) The law as to notice of

Notice of
limitation of
liability.

(1) But see *The Railroad v. Lockwood*, 17 Wall. 357.

(2) *Alexander v. Toronto & Nipissing Ry. Co.*, 33 U. C. Q. B. 474; 35 U. C. Q. B. 453.

(3) *Gallin v. The London & Northwestern Ry. Co.*, L. R., 10 Q. B. 212.

(4) *Henderson v. Stevenson*, 2 Sc. App. 470; *Bate v. C. P. Ry. Co.*, 18 S. C. R. 697.

conditions on passenger tickets has now been settled by the House of Lords in *Richardson & Co. v. Rowntree* (1) where it was held that if in the opinion of the jury a passenger receiving a ticket from a shipping company does not see or know that there are any conditions thereon, he is not bound by the conditions. And if he knew there was writing on the ticket, it is a question of fact whether he had reasonable notice that the writing contained conditions, and he is or is not bound thereby according as he has had such notice or not.

Passengers' Baggage.

Checks.

27. The next question to be considered is the liability of a railway company for baggage carried for passengers, either checked or unchecked. In the first place, as to checked baggage, it is provided by sec. 250 of the Act that checks shall be affixed to every parcel of baggage having a handle, loop or fixture of any kind, delivered to any agent or servant of the company for carriage, and a duplicate of the check must be given to the passenger. By sec. 251, if the check is refused, the company is liable to the passenger for a penalty of \$8.00, recoverable in a civil action, and no fare can be collected from the passenger; and if he has paid his fare, it must be refunded. By sec. 252, any passenger who produces such a check can himself be a witness in any action or suit brought by him to prove the value of his baggage not delivered. Under the Civil Code of Quebec (2) the passenger is entitled to prove the contents and value of any piece of baggage delivered by him to a carrier, and lost or damaged.

Personal baggage.

28. But the liability of the carrier in such cases is confined to personal baggage, as it is called, and he is not liable for articles of extraordinary value, such as large sums of money, gold, silver, jewels, precious stones, or articles of unusual value, unless the contents of the trunk or package and their value have been declared to the carrier before delivery. (3) Applying these

(1) 6 R. 95 (1894), *Parker v. S. E. Ry.*, L. R., 2 C. P. D. 416 approved.

(2) C. C. 1677.

(3) C. C. 1677; and see *Cadwallader v. G. T. Ry. Co.*, 9 L. C. R. 169; and *Robson v. Hooker*, 3 L. C. J. 86; *Bruty v. G. T. Ry. Co.*, 32 U. C. Q. B. 66; *McCaffrey v. C. P. Ry. Co.*, 1 Man. 350; *Macrow v. G. W. Ry. Co.*, L. R., 6 Q. B. 612; *Mytton v. Midland Ry. Co.*, 28 L. J. Ex. 385; *Phelps v. Lon. & N. W. Ry. Co.*, 34 L. J. C. P. 259; *Cahill v. Lon. & N. W. Ry. Co.*, 30 L. J. C. P. 289, 31 L. J. C. P. 271.

principles, it is clear, in the first place, that the company will not be held liable for loss or injury occurring to any kind of baggage which was not personal to the traveller,—such, for instance, as merchandise contained in a checked trunk. This is undoubted, and the doctrine has been extended to the case of commercial travellers carrying samples of merchandise in a trunk checked as ordinary baggage. This has been decided in Quebec in a case of *Canadian Navigation Co. v. Hayes*, (1) and followed in a late case of *Packard v. C. P. R. Co.* (2) In the latter case, the plaintiff was a commercial traveller, carrying samples for his firm, and he checked his trunk containing these samples as ordinary baggage. The trunk was destroyed by fire in an accident which occurred on the railway, and, in an action to recover, it was held that the company were not liable in such a case, as the articles contained in the trunk were not personal baggage. It was strongly contended in that case that the company were liable, because the trunk was of a particular character known as a commercial traveller's trunk, which would necessarily call the attention of the agent or baggage master to the nature of its contents, and that having been checked with such knowledge, there was an implied contract on the part of the railway company to carry it as such. This, however, was held to be of no avail, such implied contract not being binding upon the company, they being only liable where an express declaration of the contents and value of the articles was made before the delivery. (3)

If, however, actual knowledge can be proved on the part of the baggage master or other servant of the railway of the nature of the goods carried, the fact of his receiving and checking it would make the company responsible in case of loss or damage. (4) But, to render the company responsible, it is necessary to positively show actual knowledge that the articles carried are merchandise. It is not enough to show, as in the case of *Packard v. C. P. R. Co.*, (5) that there was sufficient apparent upon the article itself to have directed attention to it, and to have

(1) 19 L. C. J. 269, M. L. R., 5 S. C. 64.

(2) M. L. R. 5 S. C. 64.

(3) As to samples of merchandise carried under special conditions, see *Dixon v. Rich. & Ont. Nav. Co.*, 18 S. C. R. 704.

(4) *Great Northern Ry. Co. v. Shepherd*, 21 L. J. Ex. 285.

(5) *Ubi supra*.

caused the company's employees to have made inquiries. (1) This has been held in England in the case of *Cahill v. London and Northwestern Ry. Co.* (2) There, the plaintiff gave to a railway porter a box labelled "glass," and it was placed in the luggage van. It was lost, and the plaintiff sued to recover the value. The box contained merchandise only, and no personal baggage. It was contended by the plaintiff that the fact of the box being labelled "glass" was enough to indicate to the company's servants that it contained merchandise, and that as they accepted it as such without further charge, they were liable. The action, however, was dismissed, and the remarks of Chief Justice Earle, in giving judgment in the Court of Common Pleas, are most apposite. "It seems to me," he said, "that it would be introducing a rule most pernicious to public convenience, that a railway company, to avoid being fixed with liability which, according to their regulations, they do not intend to take, should be bound to make inquiries where a package is brought which appears likely to contain merchandise, and, if they do not make those inquiries, they should be taken to know the contents of such package."

As to what would constitute personal baggage apart from merchandise, it may be laid down as a safe rule that all things which are general and customary for a passenger to carry for his use, and which are suited to his condition in life, would be regarded as personal baggage. Whatever a passenger takes with him for his personal use and convenience, and that is to be judged in relation to his habits or wants as a member of the particular class of society to which he belongs, either with a view to present necessities or any purpose for which the journey is undertaken, is to be regarded as personal baggage. (3)

In Quebec a carrier has been held responsible for the loss of jewellery and such like articles contained in the trunk of a lady passenger, and which had been lost during the voyage, they being proved to be suitable to her condition in life, though of considerable value. (4)

(1) *Lee v. G. T. Ry. Co.*, 36 U. C. Q. B. 350.

(2) 30 L. J. C. P. 289, 31 L. J. C. P. 271, 13 C. B. N. S. 818.

(3) *Macrow v. G. W. Ry. Co.*, L. R., 6 Q. B. 612; *Phelps v. Lon. & N. W. Ry. Co.*, 34 L. J. C. P. 259; *Hudston v. Midland Ry. Co.*, 38 L. J. Q. B. 213; *Bruty v. G. T. Ry. Co.*, 32 U. C. Q. B. 66.

(4) *Woodward v. Allan*, 1 L. N. 458.

In Ontario, where the passenger, a carpenter by trade, had in his box, which was lost, a concertina, a rifle, a revolver, *two gold chains, a locket, two gold rings, a silver pencil case*, a sewing machine, and a quantity of tools of his trade, it was held that the articles in italics were personal baggage for which the carrier was responsible, but that the others were not;—*Wilson, J.*, however, dissenting as to the concertina. (1) In the United States, however, it has been held that a set of tools of reasonable worth may be considered part of the personal baggage of a carpenter or mechanic. (2)

On the other hand, it has been held in England that a quantity of bedding carried in a trunk, consisting of six pairs of sheets and an equal number of blankets and quilts, was not personal luggage. This was in the case of *Macrow v. Great Western Ry. Co.* (3) There the plaintiff had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself with a home in London. The trunk was lost, and he took action against the railway company for the value of these articles. Chief Justice Cockburn said in that case that "the term 'ordinary luggage,' being confined to what is personal to the passenger and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier. Now, though we are far from saying that a pair of sheets or the like, taken by a passenger for his own use on a journey, will not be considered as personal luggage, it appears to us that a quantity of articles of this description, intended not for the use of the traveller on the journey but for the use of his household, when permanently settled, cannot be held to be so."

In another case the pencil sketches of an artist placed in his portemanteau were held not to be part of his ordinary baggage, so

(1) *Bruty v. G. T. Ry. Co.*, 32 U. C. Q. B. 66.

(2) *Porter v. Hildebrand*, 14 Penn. St. 129; *Kansas City Ry. Co. v. Morrison*, 34 Kan. 502; *Davis v. The Railroad*, 10 How. Pr. 330.

(3) L. R., 6 Q. B. 612.

as to enable them to be conveyed free of charge. (1) Again, title deeds of a client, which an attorney may be carrying with him to produce in court, would not be considered as personal baggage; nor would bank notes to a considerable amount carried in a bag to pay the expenses of the trial of a suit. (2) But otherwise, if the money is carried to pay travelling expenses not exceeding a reasonable amount. (3) It is, however, generally a question of fact as to what personal baggage is.

Articles, which, under certain circumstances, could not be held to be personal baggage, might be so considered under different circumstances. So where a passenger carried in his bag small articles of no great value intended for presents to his friends at his destination, they might be considered as personal baggage, although not such articles as "travellers usually carry with them as part of their baggage." (4)

In a Manitoba case, (5) it was held that silk dresses, petticoats and children's clothing might fairly be held to be personal baggage, and perhaps an opera glass. As to the latter class of goods, it was held in an early Quebec case, (6) that where the traveller is a ship master, common carriers will be held responsible for a dressing case, and for night glasses and telescopes, upon the presumption that he may reasonably have thought they would be useful to him in the course of his intended voyage across the Atlantic. Again, in the Manitoba case, two suits of gentleman's clothing were held, under the circumstances of the case, not to be personal baggage, for the trunk containing them was carried as the baggage of the plaintiff's wife. Similarly, women's dresses carried in a man's trunk have been held not to be personal luggage, for which the carrier would be responsible. (7) Window curtains, blankets, cutlery, books, ornaments, etc., are not personal luggage. (8)

(1) *Mytton v. Midland Ry. Co.*, 23 L. J. Ex. 385.

(2) *Phelps v. Lon. & N. W. Ry. Co.*, 34 L. J. C. P. 259.

(3) *Merrill v. Grinnell*, 30 N. Y. 594; *Duffy v. Thompson*, 4 E. D. Smith 178; *Ill. Central Ry. Co. v. Copeland*, 24 Ill. 332. *Schouler on Bails. & Car.*, § 669.

(4) *Hudston v. Midland Ry. Co.*, L. R., 4 Q. B. 366; *The Ionic*, 5 Blatchf. C. C. 538; *Davidson v. Can. Shipping Co.*, 19 R. L. 558, Q. R. 1 Q. B. 298; *Ivatt's Carriers No.* 458.

(5) *McCaffrey v. C. P. R.*, 1 Man. 350.

(6) *Cadwallader v. G. T. R.*, 9 L. C. R. 169.

(7) *Mississippi P. Ry. v. Kennedy*, 41 Miss. 671.

(8) *McCaffrey v. C. P. R.*, 1 Man. 350.

In estimating the kind, quantity, and value of the baggage which is allowed to the passenger, it is fair to take into view whence he comes, whither he goes, and what is his occupation and social standing. (1)

29. There is no doubt that the carrier is equally responsible for Unchecked baggage, whether it is put into the baggage car or is baggage. put into the passenger car, unless indeed such baggage is carried in the car contrary to the regulations properly published and brought to the knowledge of the passenger either actually or by presumption of law. The baggage is in the eye of the law in the custody of the company, even though carried by the passenger himself in the car, and they would be responsible for its loss as if it had been checked, though there is a modification of the carriers' liability as insurers in such a case. It was held in England, in the case of *Bergheim v. G. E. R. Co.* (2) that the carrier is only liable in case of negligence. "The company must be held liable as respects those goods as bailees for hire and contractors to carry, and therefore liable for loss or injury caused by negligence but not otherwise; the company have in fact the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself." (3) The doctrine was more correctly stated in a case of *Talley v. Great Western Ry. Co.* (4) per Willes, J., who said: "With respect to articles which are not put in the usual luggage van, and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, so that he, and not the company's servant, has *de facto* the entire control of them, the amount of care and diligence reasonably necessary for their safe conveyance is in fact considerably modified by the circumstance of their being, during that part of the journey in which the passenger might under ordinary circumstances be expected to be in the carriage, intended by both parties to be under his personal inspection and care. There is great force in the argument that when articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession,

(1) Schouler Bail. & Car., § 6; 1.

(2) L. R., 3 C. P. D. 221.

(3) Per Cotton L. J. at p 225.

(4) L. R., 6 C. P. 44.

" the wide liability of the common carrier, which is founded on
" the bailment of the goods to him, and his being entrusted with
" the entire possession of them, should not attach, because the
" reasons which are the foundation of the liability do not exist.
" In such cases, the obligation to take reasonable care seems
" naturally to arise, so that when loss occurred, it would fall on
" the company only in the case of negligence in some part of the
" duty which pertained to them, and that in such a case, it was
" an implied term in the contract of carriage that, in return for
" the convenience of having his luggage at hand, the passenger
" should during the journey take such care of his own property
" as might be expected from an ordinarily prudent man, and
" should not by his own negligence expose it to more than
" ordinary risk of luggage carried in a passenger carriage, and
" that the liability of the company was, under such circumstances,
" modified by the implied condition that the passenger should
" use reasonable care, and where the loss was caused by his
" neglect to do so, and would not have happened without such
" negligence, the company would not be responsible." (1)

The opinions expressed in this case, and in those cited in the note, have been entirely concurred in by the House of Lords in the comparatively recent case of *Great Western Railway Co. v. Bunch*, (2) where the rule is laid down as follows: " A railway company accepting passengers' luggage to be carried in a carriage with the passenger enter into a contract as common carriers, subject to this modification, that, in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory." And the reasoning in the *Bergheim* case (3) was disapproved.

In this country the same rule prevails. In the Ontario case of *Gamble v. The Great Western Railway Company*, (4) Draper C. J., held that the only difference caused by the system of check-

(1) And see *Richards v. Lon., Brighton & South Coast Ry. Co.*, 18 L. J. C. P. 251; *Butcher v. Lon. & S. W. Ry. Co.*, 24 L. J. C. P. 137.

(2) 13 App. Cas. 31, and at pp. 42 and 55.

(3) *Supra*, p. 349.

(4) 24 U. C. Q. B. 407.

ing, as against the English system, was that the former was to be considered as an additional precaution to prevent the baggage from being given up to the wrong person, and the laws of this country and of England are the same as regards the railway company's liability. In the leading American case, (1) where the railway company were declared not liable for the loss of plaintiff's overcoat which he had taken into the car with him, it was pointed out that "the overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers." But in this country, as in England, such delivery into the possession of the carrier is implied from the usual course of dealing in such cases, and Hagarty, J., in the Gamble case (2) said: "If defendants ordinarily permit passengers to take articles of luggage into the carriage with them, making no objection, and not requiring them to surrender it into their servants' special charge, it is not easy to see why they should not be responsible." (3)

In a Quebec case (4) it was held that a carrier is not liable for the loss or theft of an overcoat carried by a passenger in a steamboat, and placed by a passenger on a sofa in the eating saloon, while he was taking supper. And Monk, J., drew a distinction between this case and the Ontario one quoted above, to the effect that in the latter case it was luggage that was lost and in this case it was an overcoat, which was a distinction of some moment. This was a case where the article, whether to be considered as baggage or not, could hardly be considered as within the control or under the charge of the carrier, but practically entirely in the charge of the owner, and lost through his own negligence; though the case turned partly upon the point that the coat was not baggage.

30. Carriers are not only responsible for articles of baggage received by them on their trains or vehicles, but for articles delivered to their proper officers or servants for carriage, even though, in the case of a railway, never actually placed upon the train. (5) So in England, it has been held that a railway company

When liability begins.

(1) *Tower v. The Utica & Schenectady Railroad Co.*, 7 Hill (N.Y.) 47.

(2) *Supra*, p. 350.

(3) At p. 412.

(4) *Torrance v. The Richelieu Company*, 10 L. C. J. 335 (1866).

(5) C. C. 1674; *Lovell v. Lon., Chat. & Dover Ry. Co.*, 45 L. J. Q. B. 476.

is liable for the loss of baggage delivered to a porter who undertook to place it upon the train while the passenger was purchasing her ticket, and that the porter was a person held out by the railway company as authorized to receive baggage and other articles for transportation, and that the passenger was not personally bound to see the luggage placed upon the train; and it having been lost or stolen, the company was liable. (1)

And in a Quebec case it has been held that where a person in the employ of the carrier assumes the charge of baggage delivered on board of a vessel, the carrier is liable for such baggage, though the person who received the baggage was there merely during the temporary absence of the officer whose duty it was to receive baggage. (2) And, similarly, where baggage was delivered to the company's policeman, at one of their depots, several hours before the departure of the train, it was held that the company were liable, in the absence of proof that the plaintiff had knowledge of the company's by-law declaring them not responsible for unchecked baggage. (3)

Checks given for baggage are merely evidence of its having been received by the carrier, and its non-delivery, but do not of themselves establish the carrier's liability therefor. (4) In a Nova Scotia case (5) a passenger sued for the value of her trunk, which she alleged had been placed in the hands of the company's servants, and a check given her therefor. Defendants denied receipt of the trunk, and gave evidence that plaintiff had received the check, not from them, but from the cabman who had driven her to the wharf. It was held that the case was one for a jury only, and not for the Court to decide. Checking is only an additional precaution to prevent the baggage being given to the wrong persons; and the company will be liable as well for the loss of articles unchecked. (6)

When
liability
ceases.

31. The generally recognized principle in England and in the United States is that the liability of the company ceases upon

(1) *Bunch v. G. W. Ry. Co.*, 13 App. Cas. 31.

(2) *Morrison v. Richelieu & Ont. Nav. Co.*, 5 L. N. 71, S. C. 1882.

(3) *Tessier v. G. T. R.*, 3 R. L. 31; but see *Welch v. Lon. & N. W. Ry. Co.*, 34 W. R. 166.

(4) *Wood on Railways*, Vol. 3, sec. 403.

(5) *Stimpson v. The New England & Nova Scotia S. S. Co.*, 3 Geld & Oxley 184.

(6) *Gamble v. G. W. Ry. Co.*, 24 U. C. Q. B. 407.

the arrival of the train, and the expiration of a reasonable time given to the passenger to take delivery of his luggage. (1) The contract of the company with the passenger is to carry him and his luggage to the point of destination, and there deliver the baggage to him, and during such transit they are liable as common carriers for the safe carriage and delivery of the luggage; but if the passenger, for his own convenience, chooses to leave the luggage at the station on the arrival of the train, they become merely depositaries, and liable only for negligence as warehousemen or bailees. (2)

"It is the duty of a railway company to have baggage ready for delivery on the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time." (3) Where a passenger, on arriving at his destination, deliberately refrained from applying for his baggage on being told by his cabman that he could not conveniently take it, and on sending for it on the following morning, one of the three trunks could not be found; it was held, on the above grounds, that the liability of the railway company as common carriers had ceased, and that the only claim (if any) which the plaintiff, under the circumstances, had against the company was as warehousemen or bailees. (4) And, in a Manitoba case, where goods remained at the station at which a passenger alighted, but it did not appear that the railway company had charged, or was entitled to charge, for storage, it was held that the company were not liable as warehousemen. (5)

The reasonable time to be given to the passenger for the taking away of his luggage would appear to depend upon such circumstances as the quantity of luggage, the number of people and the facilities afforded. In other words, the passenger must

(1) 2 Redfield, § 171; *Richards v. Lon., Brighton & South Coast Ry. Co.*, 18 L. J. C. P. 251; *Butcher v. Lon. & S. W. Ry. Co.*, 24 L. J. C. P. 137; *Patscheider v. G. W. Ry. Co.*, L. R., 3 Ex. D. 153; *Hodkinson v. Lon. & N. W. Ry. Co.*, L. R. 14 Q. B. D. 228; *Fifth v. N. E. Ry. Co.*, 36 W. R. 467.

(2) C. C. 1799, 1802.

(3) Redfield, Vol. 2, § 171, No. 3, citing *Quimet v. Henshaw*, 35 Vt. 605.

(4) *Vineberg v. G. T. R.*, 13 Ont. App. 93; and see *Penton v. G. T. R.*, 28 U. C. Q. B. 367; *Hogan v. G. T. R.*, 2 Q. L. R. 142; *Hall v. G. T. R.*, 34 U. C. Q. B. 517; *Kellert v. G. T. R.*, 22 L. C. J. 257.

(5) *McCaffrey v. C. P. Ry. Co.*, 1 Man. 350.

have time given him to secure a means of conveyance and obtain possession of his baggage, due regard being had to the quantity of baggage, the number of people, the size of the station, and so on. If, however, he voluntarily refrains from taking his baggage on the arrival of the train, and leaves it in the custody of the company, they would not be responsible, except in case of negligence. These principles have been generally recognized by the Quebec Courts, up to a very recent period. In an early case of *Hogan v. G. T. Ry. Co.* (1) Chief Justice Meredith, one of the most learned judges who has ever sat on the Bench of that Province, held that where a passenger did not call for his trunk on arriving at his destination at ten o'clock in the morning, but for his own convenience left it all day and over night in the baggage room, and it was destroyed by fire early the next morning by the accidental burning of the station, the company were not responsible. This decision was followed in a late case of *Kellert v. G. T. Ry. Co.* (2) There the same doctrine was laid down, that the responsibility of carriers with regard to travellers' baggage ceases when the owner arrives at his destination, and without a new contract between the traveller and the company to prolong the responsibility of the latter, the company are not liable for the loss of the baggage, this loss being attributable to the negligence of the traveller. The liability of common carriers is by the Quebec Code (3) assimilated to that of innkeepers, for the safe keeping of baggage and personal effects of travellers lodging in their houses; and in similar circumstances to those just mentioned, the Courts have modified the liability of the innkeeper,—that is to say, that where the relations of innkeeper and guest cease to exist, the liability of the innkeeper for baggage left in his possession afterwards is assimilated to that existing in the case of a voluntary deposit. For instance, where a person comes to lodge in a hotel, bringing baggage with him, and on his departure leaves his baggage in the hotel in the charge of the innkeeper, and does not return to lodge there, the innkeeper is only liable in case of negligence, his responsibility being only to exercise the care of a prudent administrator, and not remaining

(1) 2 Q. L. R. 142.

(3) C. C. 1672.

(2) 22 L. C. J. 257.

liable except in case of negligence. (1) In Ontario, the doctrine has been clearly recognized both with regard to railway companies as carriers of passengers' baggage, and to innkeepers. We might instance the case of *Penton v. G. T. Ry. Co.*, (2) where a trunk was left by the passenger in charge of the baggageman from three o'clock to eight o'clock in the afternoon, and on his return was found to be missing. It was held that the company were not responsible, as their liability ceased when the trunk was placed on the platform, and a reasonable time had elapsed for the passenger to remove it. Again, in the late case of *Vineberg v. G. T. Ry. Co.*, (3) where the passenger, upon the arrival of the train, refrained from applying for his baggage, and on sending for it the next day, one of his trunks could not be found, it was held that the liability of the company as carriers had ceased, and that the plaintiff's only claim (if any he had) against the company was as warehousemen or bailees. (4) The same principle is enunciated with regard to innkeepers in the case of *Palin v. Reed*. (5) There the plaintiff had been for some time a guest of the defendant, an innkeeper, and on leaving the inn, was allowed to leave a box containing papers, etc., in the baggage room of the hotel. On returning some days afterwards, the box could not be found. There was no other evidence of negligence. It was held that the plaintiff could not recover.

There would seem to be no difference between the law in Ontario and in Quebec in this respect. In a very recent case, however, of *Pellant v. C. P. R. Co.*, (6) the Superior Court of Quebec departed from this principle, and held that there was no difference between the liability of railway companies as carriers of passengers' baggage while in transit, and their liability as warehousemen or depositaries after its arrival. There the plaintiff, on the arrival of her baggage at Montreal, ascertained that it had safely arrived, and allowed it to remain in the company's premises for over 24 hours. On

(1) *Holmes v. Moore*, 17 L. C. R. 143.

(2) 28 U. C. Q. B. 367.

(3) 13 Ont. A. R. 93.

(4) And see *McMillan v. G. T. Ry. Co.*, 16 S. C. R. 555, per Strong, J.; *Chapman v. G. W. Ry. Co.*, L. R., 5 Q. B. D. 278.

(5) 10 Ont. A. R. 63.

(6) M. L. R., 7 S. C. 131.

sending for it the following morning, and on production of her checks, it was found that one of the trunks was missing. The whole of the baggage had been placed in the company's baggage room, and was proved to have remained there as unclaimed baggage until a short time previous to being claimed. The company, in order to rebut any presumption of negligence, proved the safety of the premises, and that one or more persons were continually present in charge of the baggage; that it had not been misssent to any other place, and could not have been taken away by mistake in exchange for other checked baggage, advancing the theory that it must have been stolen or taken away, notwithstanding all due care and diligence on the part of the company's servants. The Judge in the Superior Court held the company liable, and his decision might be supported on the ground that if, as appeared to be the case, the baggage was taken away during the day, it must have been through some fault or want of vigilance on the part of the men in charge of the baggage room; but the learned Judge laid down positively the principle that the company's liability as carriers existed until the actual delivery of the goods, and that the extent of their responsibility was the same as depositaries of the goods as it was while they were actually in transit on the railway. However, as the learned Judge took the view that, as carriers, the company would be excused in the event of an accident happening on the line without negligence on their part, such for instance as a fire, it cannot be said that he applied to the company as depositaries a greater measure of responsibility than he would have applied to them as carriers; in fact, he seems to have held that as carriers of the baggage, they would only have been liable in the case of negligence. This being the learned Judge's view, it might be well said that their responsibility as depositaries was not greater than that as carriers, but there seems to be little doubt that the jurisprudence is now well settled that their liability as carriers does not depend upon the question of negligence, but is practically absolute. This judgment was confirmed in appeal, chiefly on the ground that negligence and want of proper care on the part of the company's servants in charge of the baggage room was proved. (1)

(1) C. P. Ry. v. Pellant, Q. R. 1 Q. B. 311.

In a subsequent case it was held by the same judge, that where a transatlantic steamship company consented to keep travellers' baggage on arrival till examined by the customs officers, and placed it in their sheds, the contract of carriage was not ended until the examination was completed, and an opportunity given the passengers to take away their baggage; and that the company were liable for a trunk lost pending the examination. (1) And this would be in accordance with the principle that a reasonable time must be allowed to take away baggage.

Where baggage has been found after suit has been issued, and has been accepted by the owner, the railway company is only responsible for the taxable costs incurred up to date of delivery. (2)

§2. This subject has given rise to much discussion. A large number of decisions in the United States has resulted in rendering the law there fairly definite. ^{Liability of sleeping car companies.}

In this country there are apparently but two decisions, one in the Province of Ontario, (3) the other in the Province of Quebec. (4)

In the United States the law on the subject is briefly stated as follows by the New York *Law Journal*:—"While the company is not liable as an insurer, it is bound to furnish sleeping passengers with reasonable protection against theft, as from the very nature of the contract between the parties, it was intended that the passengers should not remain capable of protecting themselves." (5) The company is bound to have watch kept the entire night. (6)

The almost universal rule is that sleeping car companies are not liable as common carriers, or innkeepers, but only for negligence, and that the burden is upon the plaintiff to offer some proof of negligence in addition to the fact of loss. (7)

(1) *Davidson v. Can. Shipping Co.*, 19 R. L. 558. Confirmed in appeal Q. R. I. Q. B. 298.

(2) *Provencher v. C. P. R.*, M. L. R., 5 S. C. 9.

(3) *Stearn v. The Pullman Car Co.*, 8 O. R. 171.

(4) *Sise v. The Pullman Palace Car Co.*, Q. R., 1 S. C. 9, confirmed by the Court of Queen's Bench in Appeal, *Pullman Car Co. v. Sise*, Q. R., 3 Q. B. 258.

(5) *Pullman Car Co. v. Gardner*, 3 *Pennypacker* (Penn.) 78; *Carpenter v. N. Y. N. H. & H. R. R. Co.*, 124 N. Y. 53.

(6) *Ib.*; *Blum v. Southern Pullman Car Co.*, 3 Cent. L. J. 591.

(7) *Pullman Palace Car Co. v. Low*, 30 Cent. L. J. 245; *Carpenter v. N. Y. N. H. & H. R. R. Co.*, 124 N. Y. 53.

On the question of the measure of damage, it has been held that the responsibility extends only to a passenger's clothing and personal ornaments, the small articles of luggage usually carried in the hand, and a reasonable sum of money for travelling expenses, taking into consideration his circumstances in life. It certainly would be inequitable to the company to charge it with liability for any indefinitely large sum which a man may choose to carry with him and place under his pillow. (1)

The two Missouri cases last cited hold, in addition to the propositions above laid down, that a passenger who leaves in his waistcoat, in his berth, a large sum of money, while he goes to the closet at the end of the car, is guilty of contributory negligence as a matter of law. If a passenger, before retiring, leaves his clothing and valuables in an empty berth directly above him, which upper berth he has not hired and does not control, it is not as a matter of law such contributory negligence as will bar recovery. (2)

The whole gist of the matter in these sleeping car decisions is that the contract contemplates the passengers going to sleep, and that the company is therefore bound to take precautions to protect him from stealthy theft. If the passenger is awake, the ordinary rules as to the protection of his own property apply. On this point it has been held (3) where a passenger on a parlor car got off at a station for refreshments, leaving property on her seat which she did not put under the charge of defendant or its agents, and the same was stolen during her absence, that she was guilty of contributory negligence fatal to her action.

Other cases have been decided in keeping with the foregoing jurisprudence. (4)

In discussing this question from a practical point of view, it is evident that the question, as to whether sleeping car companies are or are not liable as common carriers or innkeepers, is not of such importance as the determining by the courts of the degree of negligence required to render the company responsible.

(1) *Blum v. Southern Pullman Car Co.*, 3 Cent. L. J. 591; *Root v. Sleeping Car Co.*, 28 Mo. App. 200; *Wilson v. B. & O. R. R. Co.*, 22 Mo. App. 682.

(2) *Florida v. Pullman Car Co.*, 37 Mo. App. 598.

(3) *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243.

(4) *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134; *Barrott v. Pullman Palace Car Co.*, 51 Fed. Rep. 796.

For instance, in the Ontario case, (1) which based its decision on the American cases, the question turned entirely upon the negligence of the company, and as the latter were held not to be insurers of the baggage, the burden of proof was upon plaintiff to show negligence on the part of the company. This he failed to do to the satisfaction of the judges, as he could not prove any specific act of negligence. But in a New York case, (2) where the facts were exactly the same, as was apparently the law applicable to the case, the court said: "The undisputable evidence is that the entire force employed on the sleeper, which ran over an important thoroughfare, and made frequent stops, was one man (as in the Ontario case) who acted as conductor, as porter, and was also engaged for his own profit in blackening the shoes of the passengers. Whether this employee had that part of the sleeper, which is for the common use of passengers and the servants of the corporation, constantly in view during the trip is not shown by the evidence, except inferentially. These facts affirmatively appear, and in addition it may be presumed that he assisted passengers in entering and leaving the coach at intermediate stations. The existence of these facts was not denied, nor was any explanation of them offered. The defendant gave no evidence. Under the circumstances the evidence was sufficient to put the defendant to proof of the care which it took of the occupants of the sleeper on this trip, and in the absence of any explanation on its part it was sufficient to require the question, whether the loss was caused by the defendant's negligence to be submitted to the jury."

It may be pertinently asked, why, in the United States, are all actions for losses in Pullman cars taken against the Pullman Car Company instead of the railway? Is it because the railway company, with whom the contract of carriage is always made, would not be liable? This cannot be so, for it has been held by the Supreme Court of Massachusetts, (3) that if a person, who has made a contract with a railroad corporation for his personal transportation from one place to another, takes a seat in a sleeping car, for which he had bought a ticket, and there loses an

(1) *Stearn v. The Pullman Car Co.*, 8 O. R. 171.

(2) *Carpenter v. The N. Y. N. H. & H. R. R. Co.*, 124 N. Y. 53.

(3) *Kinsley v. Lake Shore Railroad*, 125 Mass. 54.

article of personal baggage, through the negligence of a person in charge of the car, and without fault on his own part, it is no defence to an action against the corporation that the car was not owned by the defendant, but by a third person, who, by a contract with the defendant, provided conductors and servants; in the absence of evidence, that the plaintiff had knowledge of the fact.

The answer to the question lies in this: that in the United States a railroad corporation is not liable as a common carrier for an article of personal baggage kept by a passenger exclusively within his own control. (1) The contrary, of course, is the rule in England. (2) Consequently, actions in the former country have invariably been taken against the sleeping car company with a view to fixing upon them a special liability as innkeepers; but this contention has only been maintained in about one instance. (3)

We explained in a previous part of this work (4) the rule applicable to the common law provinces of this country is that laid down in the *Great Western Railway Co. v. Bunch*. (5)

Once these views are accepted here, the question as to whether sleeping car companies are liable as innkeepers or carriers will not have much practical interest in actions by passengers for the loss of their baggage.

In Quebec, however, the question as to whether sleeping car companies are liable as innkeepers or not takes a different interest, for there the term innkeeper must be interpreted according to the civil law authorities. The case of *Sise v. The Pullman Palace Car Co.* (6) decided that sleeping car companies are liable as innkeepers.

In appeal, the *Sise* case was confirmed, but, on the grounds of negligence, the Court avoiding the question as to whether the company were innkeepers. (7) In a French case, (8) decided

(1) See *Supra*, p. 351, and *Kinsley v. Lake Shore Railroad*, 125 Mass. 54.

(2) *Great Western Ry. Co. v. Bunch*, 13 App. Cas. 31.

(3) *Pullman Palace Car Co. v. Lowe*, Supreme Ct. of Nebraska, Maxwell, J., 1889, Amer. Law Register, 1890, p. 251.

(4) *Supra*, p. 350.

(5) *Ubi supra*.

(6) Q. R., 1 S. C. 9.

(7) *Pullman Car Co. v. Sise*, Q. R., 3 Q. B. 258.

(8) *Compagnie des Wagons-Lits v. Epoux Barthelemy*, Tribunal Civil de la Seine, 14 Mai 1892, translated in 1 M. L. D. & R. 323.

about the same time as the *Sise* case was decided in the Superior Court, it was held that such companies were not liable as innkeepers; and it is interesting to note that this case is now before the Court of Cassation. The decision of this Court will, no doubt, have much weight in moulding the future jurisprudence of Quebec on this point. The French case, however, decided that the sleeping car company were common carriers, acting in concert with the railway company whose lines and traction they hired.

33. There is no doubt that however much railway companies may limit the amount of baggage that travellers may take as such, and the sum for which they will be liable thereon, yet the liability will be controlled by sub-section 3 of sec. 246 of The Railway Act, and the decision of *G. T. Ry. Co. v. Vogel*, (1) but just to what extent has not yet been decided by any reported cases, although the point was barely touched upon in *Shaw v. C. P. R. Co.* (2) It was there decided that the section of the Act probably introduces an implied term in contracts to which it is applicable.

Special conditions on tickets must be brought to the notice of the purchasers thereof to bind them. (3) Thus, where the agent obtained the plaintiff's signature, explaining that it was for the purpose of identification, but did not read nor explain to her any of the conditions, and having sore eyes at the time, she was unable to read them herself, it was held that she had not had notice of the conditions. (4) And, as to the evidence in such cases, it has been held proper to admit a letter written by the defendants' baggage agent to the passenger agent, asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the reply thereto, stating that the company's rules did not require unlimited first-class tickets signed, and that this ticket had been sold at full tariff rate. (5)

The company will not be held liable for loss of baggage where

(1) 11 S. C. R. 613.

(2) 5 Man. 334.

(3) *Richardson, Spence & Co. v. Rowntree* 6 R. 95 (1894); *Bate v. C. P. R.*, 18 S. C. R. 697; *Allan v. Woodward*, 22 L. C. J. 315, Q. B.

(4) *Bate v. C. P. R.*, 18 S. C. R. 697.

(5) *Anderson v. C. P. R.*, 17 O. R. 747.

a commercial traveller, whose ticket was issued at a reduced rate, caused trunks to be checked which did not constitute his baggage proper, but contained samples, the ticket containing the condition that in view of the reduced rate the company would not hold themselves responsible for loss of goods or merchandise carried by the travellers. (1) But where the condition of the ticket issued to commercial travellers was "with allowance of 300 lbs. of baggage free, but the baggage must be at the owner's risk against all casualties," it was held by the Supreme Court, that though the goods lost were in one sense merchandise, they were to be treated as the personal baggage of a person in the position of the plaintiff travelling with samples in the course of his business; but the company were protected by the condition. (2)

Prescription
or limitation
of actions.

34. The one year's limitation clause, under sec. 287 of the Act does not apply to actions for loss of baggage arising out of contract, but only to actions for damages occasioned by the company in the execution of the powers given, or assumed by them to be given, for enabling them to maintain their railway. (4)

(1) Packard v. C. P. Ry. Co., M. L. R., 5 S. C. 64.

(2) Dixon v. Rich. Nav. Co., 18 S. C. R. 704, affirming 15 Ont. A. R. 647.

(3) Anderson v. C. P. Ry. Co., 17 O. R. 747.

CHAPTER XI.

NEGLIGENCE.

1. *Rule in the Provinces other than Quebec.*
2. *Illustrations of remote negligence.*
3. *Subsequently developed injuries.*
4. *Acts of God.*
5. *Acts of agents and servants.*
6. *Non-performance of statutory duty.*
7. *Contributory negligence.*
8. *Injuries received while avoiding danger and inconveniences.*
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10. *Negligence of parents.*
11. *Intoxication.*
12. *Burden of proof.*
13. *Presumption of negligence.*
14. *The Court and the jury.*
15. *The law of negligence in the Province of Quebec.*
16. *Injuries to persons on the railway track.*
17. *Obstructing and interrupting free use of railway.*
18. *Injuries to employees.*
19. *Volenti non fit injuria.*
20. *Special provisions for the protection of employees.*
21. *Investigation into accidents.*
22. *Cattle injured or killed on the railway.*
23. *Burden of proof.*
24. *Cattle at large on the highway.*
25. *By-laws allowing cattle to run at large.*
26. *Damage by fire.*
27. *Evidence in such cases.*
28. *Rule in the Province of Quebec as to damage by fire.*

1. As regards the English law of actionable negligence, the following definition of that term by Brett, M. R., (1) is submitted as expressing most completely its essential elements:—

"The neglect of the use of ordinary care or skill toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

It will be seen that in view of this and other definitions to the same effect, distinctions as to the various degrees of negligence are immaterial. It is indifferent whether the want of care upon

(1) *Heaven v. Pender*, L. R., 11 Q. B. D. at p. 507.

Rule in the
Provinces
other than
Quebec.

which the action is based amounts to slight or gross negligence, so long as there is an obligation to exercise that care, the want of which is the cause of injury. (1) As was said by Lord Cranworth, there is "no difference between negligence and gross negligence; it is the same thing, with the addition of a vituperative epithet." (2)

But it is also necessary, in order that the negligence should be actionable, that it should be the proximate and not the remote cause of the injury to the plaintiff. (3) In the case of *Victorian Railway Commissioners v. Coultas* (4) in the Privy Council, it was decided that damages for a nervous shock or mental injury caused by fright at an impending collision are too remote. (5) Pollock, C. B., in *Greenland v. Chaplin* (6) expressed the view that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect, to occur.

Illustrations
of remote
negligence.

2. The following are cases in which the negligence proven was held not to be the proximate cause of the injury.

A railway having unlawfully obstructed a highway crossing by a train at rest, the plaintiff, in order to avoid the obstruction, turned into another street, and there was injured by falling ice. (7) The railway had permitted a derailed and overturned car to remain at the side of a highway crossing, and the plaintiff's horse was frightened thereby. (8) Where the railway obstructed a highway crossing by a train, and the plaintiff, in avoiding the obstruction by driving across the line, at a point where there was no public crossing, and, consequently, no planking between the rails, was jolted out of his vehicle and thereby injured. (9) Where

(1) Lord Denman, 2 Q. B. 661.

(2) Rolfe B., 11 M. & W. 115.

(3) Lord Bacon, Max. Reg. 1; G. T. Ry. Co. v. Rosenberger, 9 S. C. R. 311; Metropolitan Ry. Co. v. Jackson, L. R., 3 App. Cas. 198; Canada Southern Ry. v. Phelps, 14 S. C. R. 132.

(4) 13 App. Cas. 222.

(5) And for the same rule in Quebec, see: Rock v. Denis, M. L. R., 4 S. C. 134, 16 R. L. 569.

(6) 5 Ex. 243.

(7) P. C. & St. L. Ry. Co. v. Staley, 41 Ohio St. 118.

(8) P. S. Ry. v. Taylor, 104 Penn St. 306.

(9) Jackson v. N. C. & St. L. Ry., 13 Lea (Tenn.) 491.

the carriage in which the passenger was riding was overcrowded, other persons attempted at a station to force their way into the carriage, and the plaintiff having risen to prevent their entrance as the train started, in order to save himself from falling, put his hand on the edge of the door, where it was caught and crushed by the act of the railway's servant in closing the door, in performance of his duty. (1) Where the railway set down the plaintiff and his wife and children at night in a rain storm, at a station several miles distant from that to which it had agreed to carry them, and the wife contracted a severe illness from walking in the storm. (2)

3. The general rule is that railway companies are liable for subsequently developed injuries that cannot be proved to have resulted from a sufficient independent cause, (3) as, when a premature confinement and birth of a dead child resulted from fright caused to a pregnant female passenger by a collision. (4)

4. The mere fact that a natural phenomenon has happened once, when it does not carry with it or import any probability of a recurrence, does not place it out of the operation of the rule of law with regard to the act of God. It is not necessary that it be unique, that it should happen for the first time. It is enough should that it is extraordinary, and such as could not necessarily be anticipated. (5) But where there is negligence on the part of the railway company conducive to the injury in connection with an extraordinary natural phenomenon, the railway company would be responsible. (6)

5. The relation between the railway company and the person who has omitted to perform a particular act of care is immaterial where the duty of the company towards the injured person required it to be performed for his protection:—the liability is determined by the fact of the omission. (7) But where the injury is

(1) Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 193.

(2) Hobbs v. London & South Western Ry. Co., L. R., 10 Q. B. 111; but see Toronto Ry. Co. v. Grinstead, 24 S. C. R. 570.

(3) Robinson v. C. P. Ry. Co., M. L. R., 2 Q. B. 25.

(4) Fitzpatrick v. G. W. Ry. Co., 12 U. C. Q. B. 645.

(5) Per Fry J. in N. P. & O. C. M. Co. v. L. & St. K. Docks Co., L. R., 9 Ch. D. 515.

(6) Lambkin v. South Eastern Ry. Co., 5 App. Cas. 352.

(7) Per Blackburn, J., in The Mersey Dock Trustees v. Gibbs, L. R., 1 H. L. 115.

caused by an overt act of commission, the liability depends upon the relationship of the person committing the wrongful act, and the company, and the application of the maxim, *qui facit per alium facit per se*. (1) So where a stranger put a fog signal on the track, and a passenger was injured by an explosion, the company was held not liable. (2)

But where the proximate cause of the injury is the negligence of the railway company, the fact that the negligent act of a third party contributed to the injury will not exempt the company from responsibility. (3)

Non-performance of statutory duty.

6. Where there is a duty cast upon a railway company, by statute, the company are responsible for injury directly resulting from neglect of such duty :—or at least a failure to comply with the provisions of the statute, or even of a municipal ordinance, is evidence of negligence ; but where the injuries do not directly result from neglect of such duty, the company would not be responsible merely because of such neglect. (4)

As illustrating the application of these principles the following cases may be referred to. At a place which was not a station nor a highway crossing, the N. B. Railway Company had a siding for loading lumber delivered from a saw mill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber, when a train, coming out of a cutting, frightened the horses, which dragged the deceased to the main track, where he was killed by the

(1) *Reedie v. L. & N. W. Ry. Co.*, 4 Ex. 243.

(2) *Jones v. G. T. R.*, 45 U. C. Q. B. 193.

(3) *Illidge v. Goodwin*, 5 C. & P. 190 ; *Lynch v. Nurdin*, 1 Q. B. 29 ; *Daniels v. Potter*, 4 C. & P. 262 ; *Hughes v. Macfie*, 2 H. & C. 744 ; *Collins v. M. L. Commrs.*, L. R., 4 C. P. 279 ; *Sneesby v. L. & Y. Ry.*, L. R., 1 D. 42 ; *Clark v. Chambers*, L. R., 3 Q. B. D. 327 ; *Smith v. L. & S. W. Ry.*, L. R., 5 C. P. 98 ; *Burrows v. March, G. & C. Co.*, L. R., 5 Ex. 67, 7 Ex. 96 ; *Walling v. Oastter*, L. R., 6 Ex. 73.

(4) *Williams v. G. W. Ry.*, L. R., 9 Ex. 157 ; *Hayes v. M. C. R. Ry.*, 111 U. S. 228 ; *Nitro Phosphate Co. v. L. S. & St. K. Co.*, L. R., 9 Ch. D. 503 ; *Atkinson v. N. & G. Water Works Co.*, L. R., 2 Ex. D. 441 ; *Hanlon v. S. B. H. Ry. Co.*, 129 Mass. 310 ; *Kelley v. H. & St. J. Ry. Co.*, 13 Am. & Eng. Ry. Cases 638 ; *Meek v. Penna. Co.*, *ibid.* 643 ; *Great Western Ry. v. Brown*, 3 S. C. R. 159 ; *G. T. R. v. Rosenberger*, 9 S. C. R. 311 ; *G. T. R. v. Sibbald* ; *G. T. R. v. Tremayne*, 20 S. C. R. 259 ; *Couch v. Steel*, 3 E. & B. 402 ; *Blamires v. L. & Y. Ry.*, L. R., 8 Ex. 283 ; *Britton v. G. W. Cotton Co.*, L. R., 7 Ex. 130 ; *Stapley v. L. B. & S. C. Ry.*, L. R., 1 Ex. 21.

train. It was held that there was no duty upon the company under the statute to ring the bell or sound the whistle, or to take special precautions in approaching or passing the siding. (1)

As another instance of a similar accident may be mentioned the case of *Howe v. Hamilton & North Western Ry. Co.*, (2) where the Court of Appeals in Ontario decided that a railway company was not responsible for an accident caused by a horse taking fright at an engine standing near a crossing of a public road, where the company had been empowered by the corporation to run their railway along the highway, there being no proof of negligence on the part of the railway company in the management of the locomotive. And the same doctrine was upheld in a case in Quebec, (3) where a horse took fright at the escape of steam from a locomotive standing on one of the wharves at Quebec, and was killed; the Court holding that the escape of steam was without negligence on the part of the driver or person in charge of the engine, and was a necessary consequence of the exercise of the powers of the railway company, and the engine being lawfully where it was under the charter of the company, and the permission given by the City Council to construct and operate the railway at that point.

But where the railway company had erected posts on their line at some distance from a highway crossing and bridge, for the purpose of indicating that trains should stop there before approaching the bridge, and a train, instead of stopping at the posts, came on to within a few yards of the bridge, and the engine remained there blowing off steam, whereby the plaintiff's horses, attempting to cross the bridge, were frightened and ran away, the company were held liable for the ensuing damage. (4)

(1) *New Brunswick Ry. Co. v. Vanwart*, 17 S. C. R. 35; and see *C. P. R. v. Lawson*, Supreme Court 1885, Cassels, p. 731; *G. T. R. v. Boulanger*, Supreme Court 1886, Cassels, p. 734; *G. T. R. v. Beckett*, 16 S. C. R. 713; *Can. Southern Ry. Co. v. Jackson*, 17 S. C. R. 316; *Jones v. G. T. R.*, 18 S. C. R. 696.

(2) 3 Ont. A. R. 336.

(3) *C. P. R. Co. v. Chateauvert*, 16 R. L. 28.

(4) *C. P. R. Co. v. Lawson*, Cass. Dig. 731; and see *G. T. R. Co. v. Roenburger*, 9 S. C. R. 311.

Contributory
negligence.

7. Where the person injured has contributed to the injury by failure to exercise ordinary care, to such an extent that the accident would not otherwise have happened, the railway company would not be held responsible for such injury. (1) The obligation to exercise ordinary care by the injured party depends upon the particular facts and circumstances of each case. So he is not bound to exercise the same degree of care, when he has been induced by the action of the company's servants to act in a manner he would otherwise not have done, as, for instance, where the railway company have by their servants invited a passenger to embark on a train when it was not safe to so embark. (2) Although negligence upon the part of the plaintiff may have in fact contributed to his injury, the railway company will nevertheless be liable, if its servants could by the exercise of ordinary care have avoided the injury to the plaintiff. (3) The plaintiff's contributory negligence must, in order to bar his recovery, have been a proximate cause of the injury. (4)

Injuries
received while
avoiding
danger and
inconveniences.

8. A railway company is liable for injuries suffered by a person in attempting to escape from a situation of apparent peril, in which he has been placed by the negligence of the railway company, whereby he is forced to adopt one of two perilous alternatives (5); as well as for injuries occasioned to a person in attempting to avoid a serious inconvenience to him by acting in a manner not necessarily dangerous; (6) but not for injury to a person attempting to avoid a slight inconvenience by a rash and dangerous action. (7)

Children, etc.

9. Lunatics, idiots and children are to be held only to the exercise of that degree of care and discretion which ought reasonably to be expected of persons of their age and capacity. (8) The general rule is that it is a question of fact, under the particular

(1) *Butterfield v. Forrester*, 11 East 60; *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244; *Moffette v. G. T. R. Co.*, 16 L. C. R. 231; *Roy v. G. T. R. Co.*, M. L. R., 1 Q. B. 353.

(2) *Hall v. McFadden*, Cassel's Digest 724.

(3) *Davies v. Mann*, 10 M. & W. 546; *Radlay v. L. & N. W. Ry.*, 1 App. Cas. 754.

(4) *Witherly v. Regent Canal Co.*, 12 C. B. N. S. 2.

(5) *Jones v. Boyce*, 1 Starkie 493; *Wilson v. Newport Dock Co.*, L. R., 1 Ex. 177; *Adams v. Lan. & Yorkshire Ry. Co.*, L. R., 4 C. P. 743.

(6) *Adams v. Lancashire & Yorkshire Ry. Co.*, L. R., 4 C. P. 739.

(7) *Bramwell, J.*, in *Siner v. G. W. Ry.*, L. R., 3 Ex. 154; *Gee v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 161.

(8) *Lynch v. Nurdin*, 1 Q. B. 29.

circumstances of each case, what amount of reason and discretion ought to have been exercised by the injured infant; (1) but where the injured person is confessedly of average capacity, and an infant only in legal theory, it is a question of law for the court and not one of fact for the jury. (2)

10. When the injured person is an infant of tender years, it is held in the United States that it is for the jury and not for the court to determine whether or not the contributory negligence of the parents or guardians of the infant, in permitting him or her to be at large, would defeat the action. (3) The question does not seem to have been directly raised in England, neither *Lynch v. Nurdin*, (4) *Singleton v. E. C. Ry.*, (5) *Mangan v. Atterton*, (6) nor *Waite v. N. E. Ry.*, (7) definitely decide the question. But in Quebec the parents' negligence has been held to preclude recovery of damages. (8)

11. The fact of the intoxication of the injured person at the time of the injury will not only not relieve him from the legal consequences of his contributory negligence, but also, if his intoxicated state contributed to the happening of the injury, will be admissible in evidence as proof of contributory negligence. (9)

12. The burden of proof is upon the plaintiff of showing affirmatively negligence upon the part of the railway. (10) And in regard to contributory negligence, the English rule is, that if the plaintiff's case has shown the railway to have been negligent, and the railway relies upon contributory negligence as a defence, the burden is on the railway of proving that contributory negligence. (11)

(1) Patterson Ry. Accidt. Law, p. 69.

(2) *Ib.*, pp. 70-71. (3) Patterson, p. 90. (4) 1 Q. B. 29.

(5) 7 C. B. N. S. 287. (6) L. R., 1 Ex. 239. (7) El. Bl. & El. 719.

(8) M. C. P. Ry. Co. v. Dufresne, M. L. R., 7 Q. B. 214.

(9) Patterson, Rly. Accdt. Law 74, and cases there cited.

(10) Patterson, 433, *Roy v. G. T. R.*, M. L. R., 1 Q. B. 353; *Moffette v. G. T. Ry. Co.* 16 L. C. R. 231. *Falconer v. European & North Amer. Ry. Co.*, 1 Pug 179.

(11) *Smith on Negligence*—Patterson 435; *D. W. & W. Ry. v. Slattery*, 3 App. Cas. 1155. But in Quebec, see *Moffette v. G. T. Ry. Co.*, 16 L. C. R. 231. In Ontario held: In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and defendant, and though the judge may rule negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either is proved. The question of proof is for the jury. *Morrow v. Can. Pac. Ry.*, 21 Ont. A. R. 149.

Presumption
of negligence.

13. There is a rebuttable presumption of negligence on the part of the railway in the case of an injury caused by circumstances from which may fairly be inferred a non-performance of duty on the part of the railway. (1)

The Court
and the jury.

14. It is the duty of the judge to determine whether, as to each issue before the jury, competent evidence has been produced, which would justify men of reasonable minds in finding a verdict in favor of the party upon whom rests the burden of proof in that particular issue. (2)

In *Ryder v. Wombwell*, (3) Willes, J., said: "There is in every case a preliminary question which is one of law, viz.: whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a non-suit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant." In *Bridges v. N. L. Ry.*, (4) Pollock, B., said, referring to *Ryder v. Wombwell*: "This is a clear expression of the rule, and it has been generally acquiesced in, and acted upon, and it follows from it that, although the question of negligence or no negligence is usually one of pure fact, and, therefore, for the jury, it is the duty of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case, and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present a hypothesis which comes within that legal definition, then to withdraw them from their consideration." In *Jackson v. Metropolitan Ry.*, (5) Cairns, L. C., and Lords O'Hagan, Blackburn and Gordon concurred in holding that *Bridges'* case did not have the effect attributed to it in the Court below, of qualifying the rule in *Ryder v. Wombwell*, Cairns, L. C., saying: "The judge has a certain duty to discharge, and the jury

(1) *Patterson* 438, *Carpue v. L. & B. Ry.*, 5 Q. B. 747; *Scott v. L. & St. K. Docks Co.*, 3 H. & C. 596; *G. W. Ry. Co. v. Braid*, 1 Moore P. C. N. S. 101; *Chalifoux v. C. P. Ry. Co.*, 22 S. C. R. 721.

(2) *G. T. R. v. Wilson*, Cassel's Dig., p. 723; *Can. Atl. Ry. Co. v. Moseley*, 15 S. C. R. 145.

(3) L. R., 4 Ex. 32.

(4) L. R., 7 II. L. 213.

(5) 3 App. Cas. 193; and see *Dublin W. & W. Ry. Co. v. Slattery*, 3 App. Cas. 1155.

"have another and a different duty. The judge has to say "whether any facts have been established by evidence from which "negligence may be reasonably inferred; the jurors have to say "whether from those facts, when submitted to them, negligence "ought to be inferred."

15. In so far as concerns the duty a person owes of observing The law of ordinary care and skill in his relations towards others, the law of negligence in the Province of Quebec does not materially differ of Quebec. from the rule prevailing in the other Provinces. (1)

The diversion between the two systems commences with the doctrine of contributory negligence. In the earlier cases, before the Code, the English doctrine of contributory negligence was fully recognized; but, since the Code has come into force, especially of late years, there has been a disposition on the part of the Courts to adopt the jurisprudence of the French Courts in interpreting the articles of the Code Napoléon on the same subject. It must be remarked, however, that there is a distinction to be made between Article 1053 of the Quebec Code and Article 1382 of the Code Napoléon. Article 1053 of the Quebec Code reads as follows :—

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill," whereas, in the French Code, the governing words "by his fault" are omitted.

The earliest case of importance in Quebec is that of *Moffette v. Grand Trunk Ry. Co.*, (2) decided by the Superior Court in Review in 1866. This was a case of injury at a highway crossing. The holding there was that the party suing in damages, resulting from imputed fault or negligence on the part of the defendant, must himself be without any misconduct or fault, and have used ordinary care; and that where an injury has resulted from the negligence of both parties, more especially if without any wanton or intentional wrong on the part of either, the action will not lie ;

(1) *Stephens v. Chaussé*, 15 S. R. 379; *G. T. R. v. Boulanger*, Cass. Dig. 734; *C. P. R. Co. v. Chalifoux*, Cass. Dig. 749; *Lambkin v. South Eastern Ry. Co.*, 5 App. Cas. 352.

(2) 16 L. C. R. 231.

and that, though the defendant is guilty of negligence causing damage to the plaintiff, yet, where the plaintiff is guilty of want of ordinary care, contributing essentially to the injury, he cannot recover; and that the burden of proof is upon the plaintiff to show negligence on the part of the defendant and freedom from negligence on his own part.

In 1871, it was held in *Maguire v. The City of Montreal*, (1) that a municipal corporation is not responsible for damages caused by obstructions left on the street, if the party injured could have avoided the obstruction by the exercise of ordinary care. And the same principle, that the plaintiff's negligence would defeat the action, was recognized by the Superior Court in 1874. (2)

In 1877, in *Periam v. Dompierre*, (3) it was decided by the Court of Appeals that, where the plaintiff, a carter, went to load wood at a wharf in the port of Montreal, where a steamer was in the act of mooring, and was injured by the snapping of a cable, he was guilty of contributory negligence in not avoiding the danger which was evident, and in unnecessarily placing himself in a position of danger. In a later case, however, where an accident arose from a similar cause, the Court of Appeals held that the action would lie, inasmuch as the person injured by the breaking of the rope had been requested by the ship master to cast it off the mooring post, and when injured was standing in a position that was necessary for him to occupy to perform that act. (4) In this case, however, there was a strong dissent by Ramsay and Cross, J. J., on the ground that the party injured was guilty of contributory negligence.

In 1879 it was held by the Court of Review that, in an action of damages for injury suffered while walking on a railway track near a crossing, the plaintiff, owing to his contributory negligence, could not recover. (5) This judgment was rendered by Mackay, J., who quoted from Sherman and Redfield on Negligence, as well as Sourdats on *Responsabilité*. It is to be noted that Sourdats, in cases such as these, lays down a doctrine which,

(1) 3 R. L. 450.

(2) 1 L. N. 5.

(3) *Corner v. Byrd*, M. L. R., 2 Q. B. 262.

(4) *Wilson v. G. T. Ry. Co.*, 2 L. N. 45.

(5) *Ware v. Carsley*, 5 R. L. 238.

to the extent to which it goes, is equivalent to the English rule ; thus he says : (1)

"If the injured party has himself contributed to his injury by a personal fault, this is a bar to his action"; but he goes on to say: "If it consists only in imprudence, it is but fair that it should set off against a like fault committed by the immediate agent of the injury."

The decision in the *Wilson* case was reversed by the Court of Appeals, (2) on the ground that the accident occurred through the gross negligence of the company's servants, and this judgment was confirmed by the Supreme Court. (3)

In another case, decided in 1881, (4) it was held that while a person carrying on a trade is bound to have his premises in a safe condition for persons coming there by implied invitation to give him their custom, yet he may relieve himself from damages arising from the unsafe condition of the premises by showing that there was contributory negligence on the other side, without which the accident would not have occurred. And, therefore, where a valuable horse received an injury while being shod by a farrier, and it appeared that the accident was caused by the groom in charge of the animal striking him with a whip, the farrier was relieved from liability, notwithstanding that the horse was injured partially through the unsafe condition of the floor of the smithy. This decision was based on the ground that the animal could not have been injured in the way in which it was, had not the groom caused it to plunge by striking it.

Under the jurisprudence in France, where the doctrine of comparative negligence obtains, it would seem that in such a case as this the plaintiff would have been entitled to recover, but the damages would have been reduced or compensated to some extent by the contributory negligence of the defendant. (5)

Where, however, the negligence of the plaintiff is gross, and

(1) 1 Sourdut 660.

(2) 2 Dor., Q. B. R. 131.

(3) Cass. Dig. 722.

(4) *Allan v. Mullin* 4 L. N. 387.

(5) Cass., 20th Aug., 1879; S. 80, 1, 55; D. 80, 1, 15; Cass., 5th Aug., 1879; S. 81, 1, 403; D. 81, 1, 268; Cass., 8th Feb., 1875; S. 75, 1, 204; D. 75, 1, 320; Paris, 4th Feb., 1870; S. 70, 2, 324; D. 70, 2, 111; Paris, 21st Dec., 1874; D. 76, 2, 72; Caen, 17th Mar., 1880; S. 80, 2, 176; Nancy, 9th Dec., 1876; Aix, 10th Jan., 1877; Bordeaux, 19th Aug., 1878.

that of the defendant is slight, the former cannot recover even in France. (1)

The French doctrine of comparative negligence seems to have been adopted in a Quebec case, decided in the Circuit Court in 1883, (2) in which it was held that where a collision occurred between two vehicles, and both drivers were in fault, but it appeared that the accident nevertheless might have been averted by ordinary care on the part of one of the drivers who did not stop when requested, the latter was held liable in mitigated damages; in this case the plaintiff's contributory negligence consisted in violating the rule of the road by driving on the wrong side, but it appeared that the defendant could have avoided the accident by the use of ordinary care.

In a subsequent case decided by the Court of Appeals in 1885, where the plaintiff was injured on the railway track at a street crossing, it was held that he must show that the company were guilty of some fault or negligence, whereby the injury was caused; and having attempted to cross, notwithstanding that the warnings and signals required by the Act had been given, plaintiff could not recover for consequent injury. (3)

The true rule in such cases, it appears to the author, would be to ascertain whether the proximate cause of the injury is due to the negligence of the plaintiff or the defendant; and if it be ascertained that the proximate cause of the injury is the negligence of the plaintiff, without the occurrence of which he would not have been injured, it is difficult to see how, under Article 1053, the defendant could be held liable, even if there was also fault upon his part, so long as his fault was not the proximate cause of the injury. (4) The rule thus stated would seem to be in accordance with the principles deducible from Article 1053 of the Civil Code; and, thus stated, would not seem to differ materially from the English doctrine of contributory negligence, though that doctrine is not technically known to the Quebec

(1) Cass., 15th Nov., 1881; Sirey 83, 1, 402; Larombière vol. 7, p. 560; Sourdât, Responsabilité, No. 660.

(2) Therrien v. Morrice, 6 L. N. 110.

(3) Roy v. G. T. R. Co., M. L. R., 1 Q. B. 353.

(4) C. P. Ry. Co. v. Cadieux, M. L. R., 3 Q. B. 315; Allan v. Merchants Marine Ins. Co., 18 R. L. 481; Currie v. Couture, 19 R. L. 443; Sarault v. Viau, 11 R. L. 217; Gagnon v. Forsyth, 5 R. L. 228.

law. This view has now been adopted by the Supreme Court in the case of *The Quebec Central Ry. Co. v. Lortie*. (1) In this case the defense was contributory negligence of plaintiff in alighting from the train, and the court sustained the defense. (*Fournier J. Diss.*)

As was stated by Ramsay, J., in the Court of Appeals, in *Faucher v. North Shore Ry. Co.*, (2) in discussing the difference between the Civil and Common Law doctrines, the difference between them is not so great as is generally supposed; as the learned judge there said: "In the French jurisprudence they have not precisely in so many words the doctrine of contributory negligence which throws the responsibility on the sufferer, but they have the idea, as will be seen in the note in *Sirey*." (3) In this case it was held that a line of railway running alongside of a street, and not divided by any fence from the street, is not a road on which foot passengers are entitled to the same protection as if they were walking on the ordinary highway, and a person who was injured by falling over some planks lying on the track, which he might have avoided by the exercise of ordinary care, had no action against the company.

The doctrine contended for is supported by the decision of the Court of Appeals in 1887, in a case of the *The Canadian Pacific Ry. Co. v. Cadioux*. (4) The holding there was, that where the injury was caused by the negligence of the defendant, and there was negligence also on the part of the plaintiff, it is the duty of the Court to ascertain the immediate or proximate cause of the accident, and to condemn its author to pay the damages suffered by the other party. In that case, however, the Chief Justice (Sir A. A. Dorion) in delivering judgment said: "Although the majority of the Court is not disposed to alter the judgment of the Court below" (in plaintiff's favor), "it is my opinion that where both parties are in fault, the damages should be divided between them; this was the rule of the Roman law, as it is that now followed in France, and is applied in England in Admiralty

(1) 22 S. C. R. 336, reversing S. C. & Q. B.; not reported.

(2) 9 L. N. 75, Q. B. (Que. 1886).

(3) *Sirey* Codes Annotés, Article 1382 C. N., No. 533; and see *Sirey* 83, 1, 402.

(4) M. L. R., 3 Q. B. 315.

"cases. However, the rule has never been adopted in this country, although I think it is the better rule."

Notwithstanding this statement by the learned Chief Justice, that the French rule of mitigating the damages in cases of common fault has never been adopted in this country, it was recognized in a former case by the Superior Court in 1886, (1) and in a later case, (2) decided in 1889 by the Superior Court in Review. There the plaintiff's husband tried to cross a railway track at intersection with the highway; he was warned by the gate-keeper not to cross, but persisted in so doing, the gate was closed; it was daylight, the engine bell was ringing, and the approaching train could be seen for three-quarters of a mile from the point of intersection. The jury found for plaintiff, but the Court of Review granted a new trial on the ground that the verdict was against the evidence. The trial judge, however, in charging the jury, had admitted the principle of mitigated damages, and his charge seems to have been approved by the full Court.

In another case in the same year (3) the judges were equally divided. In that case the plaintiff was driving in a cart with two men, and was leading two horses behind the cart by a rope or halter twisted around his thumbs; two of the defendant's dogs rushed out, their barking frightened the horses, with the result that part of the plaintiff's thumb was torn off. In the first Court, the Judge sitting without a jury found for the plaintiff in five hundred dollars damages, the amount being reduced to that sum on the ground of his contributory negligence in leading the horses in the way in which he did; but in the Court of Review, the judgment was reversed, and the action dismissed, Wurtele, J., dissenting. The Court, however, allowed no costs, in order to discourage the habit which existed in the country of keeping vicious dogs, which flew out at persons passing by.

In two more recent cases, however, the principle of reducing the damages where there is common fault was recognized and applied in the Superior Court. In one of these cases, that of

(1) *Daoust v. Laverdure*, 14 R. L. 279.

(2) *Curran v. G. T. Ry. Co.*, M. L. R., 5 S. C. 251.

(3) *Vital v. Tétreault*, 34 L. C. J. 26.

White v. The City of Montreal, (1) the holding was "that a municipal corporation cannot escape responsibility for the condition of a road rendered dangerous by a sudden thaw and subsequent frost; but where the person injured undertakes to venture down a steep hill in winter time without creepers and wearing well worn rubbers, such imprudence on his part having contributed to the accident must go to mitigate the damages." In the other case decided in the same year, it was held that, where there is common fault on the part of the master and his servant, the master is still liable, but the fault of the servant is to be considered in determining the quantum of damages. (2)

The above summary of the jurisprudence in the Province of Quebec shows the unsettled state of the law; and some authoritative decision of the highest Courts is needed to set the question at rest. The decision of the Supreme Court in *Quebec Central Ry. Co. v. Lortie* (3) might be regarded as such, but that their Lordships, with the exception of the dissenting judge (Fournier J.) and Gwynne J. gave no reasons for allowing the appeal, and the latter's opinion was based solely on the ground that the accident was attributable wholly to the plaintiffs' own negligence.

However, a recent decision of the Court of Appeals would seem to go far in deciding that the negligence of the injured party, or of the persons responsible for his acts, might defeat the action. (4) It was there held that, where a child two years of age accidentally escaped from the surveillance of its mother, and straying into the street got in the way of an approaching street car, and was run over and killed, the parents could not recover; and the Court of Appeals dismissed the action, reversing the judgment of the Superior Court. (5) In this case it was proved that the child had strayed once or twice before from its mother's dwelling into a shop below, and had it not been noticed by persons in the shop, might have wandered into the street and been

(1) Q. R., 2 S. C. 342, 1892.

(2) *Pontus dit Clement v. Rousseau*, Q. R., 1 S. C. 263; but see *Desroches v. Gauthier*, 5 L. N. 404; *St. Lawrence Sugar Refining Co. v. Campbell*, M. L. R., 1 Q. B. 290; *Dominion Oil Cloth Co. v. Coalier*, M. L. R., 6 Q. B. 268.

(3) 22 S. C. R. 336.

(4) *Montreal City Passenger Cy. Co. v. Dufresne*, M. L. R., 7 Q. B. 214.

(5) *Id.* reversing M. L. R., 7 S. C. 10.

See *Chab*
R 9 4 10 MB
481
St. Lawrence
282
1891.

injured, as it eventually was; it was held, that the parents should have profited by the warning they had already received, and were precluded by their negligence from recovering damages by the death of the child. It is true that in this case the Court held that there was no negligence on the part of the defendants; though there was evidence adduced on the part of the plaintiffs that the car was running too fast, and that the driver should have seen the child and stopped the car before he did; still, it is difficult to see how the Court could have reversed the judgment of the trial Judge, who found negligence on the part of the defendants, except upon the ground of the negligence of the parents.

Injuries to
persons on the
railway track.

16. The next question to be taken up is that of the liability of railway companies in cases of injuries caused to persons upon the railway track injured by passing trains. With regard to this class of accidents, attention must be called to the provision of the Act, which prohibits every person not connected with the railway or employed by the company from walking along the track except where it is laid across or along a highway. (1) It would follow clearly from this, that in the case of a person walking upon the track, the company would not be liable in damages to him for injuries received by being struck by a train, or to his representatives in case of his resulting death, in the absence of negligence on the part of persons in charge of the train. It would be difficult to conceive of a case of negligence on the part of the driver of the engine or other person having control of the train in such cases. It would of course be the obvious duty of the engineer seeing a person walking upon the track to sound the whistle, ring the bell, or make other signal to attract his attention, but it is doubtful whether the omission to give such signals would render the company liable to such a person unlawfully upon the track. If, however, the company's servants in charge of the train had failed to comply with any of the requirements of the Act, the company might be held liable in certain supposable cases. For instance, it is required by sec. 259, that no locomotive shall pass through any thickly peopled portion of any city, town or village at a speed greater than six miles

(1) Sec. 273.

an hour, unless the track is properly fenced. This of course would mean that the track is fenced on both sides, with proper gates at street or highway crossings, and in the case where this provision of the Act was disregarded, and it was shown that the accident resulted from such disregard of the positive provisions of the law, the company might be held liable. Again, by sec. 260, it is required that trains moving reversely in any city, town or village shall have a man on the last car of the train to warn persons standing upon or crossing the track of the approaching train. A disregard of this provision of the Act would doubtless render the company liable in case of an accident resulting in the injury of any person on the track. (1)

The cases which most frequently occur, however, are those of accidents at level crossings, where the railway crosses streets or highways at rail level. The frequency of such crossings in this country has resulted in large numbers of unfortunate accidents, notwithstanding the provisions of the Railway Act intended to prevent as far as possible their occurrence. By sec. 256 of the Act, provisions are made for signals to warn travellers on the highway of the approach of trains at such crossings. It is required that the bell of the engine, which by sec. 244 must be of at least thirty pound weight, shall be rung or the whistle sounded at the distance of at least eighty rods from every highway crossing, and the bell must be kept ringing or the whistle sounding at short intervals until the engine has crossed the highway; and the same section provides a penalty of eight dollars for each neglect to comply with its provisions, and further makes the company liable for all damage sustained by any person by reason of such neglect. And it is to be noted that one-half of the penalty and damages are chargeable to the engineer who neglected to sound the whistle or ring the bell, and may be collected from him by the company. Such are the duties cast upon the railway company by the Act in order to prevent, as far as possible, such accidents from occurring, in addition to the provisions of secs. 183 to 191, with reference to the crossing of highways, and the powers given to the railway committee to take measures of precaution with regard to level crossings. Where the

(1) See *Casey v. C. P. R. Co.*, 15 O. R. 574.

crossing is especially dangerous, the railway committee may, if it permits the crossing at a level at all, order the erection of gates or the posting of watchmen, or other protection; but unless the railway committee so orders, the absence of such protection would not be an element in deciding upon the liability of the railway company; (1) their liability in all such cases would depend first upon the question as to whether they or their servants were guilty of negligence.

The omission to comply with the statutory regulations as to the giving of signals is always an important element in determining the liability in such cases, but there is also a duty cast upon the traveller using the highway and crossing the railway, which is of great importance in the decision of such cases. A railway train cannot be stopped except within a certain distance, according to the velocity at which it is being propelled, whereas the traveller on foot or in a vehicle can easily come to a halt in approaching a railway crossing. In these cases, it is always the old question as to whose fault it is that an accident occurs. If a man, either on foot or driving or riding, goes blindly upon a railway crossing, without looking either to the right or the left, and taking no heed, it would be hard to say that the railway company should be liable, should he be struck by a passing train. It is the generally accepted principle that the duty cast upon the traveller in approaching a railway crossing by the highway is to make use of his senses of sight and hearing, and both, to look and listen for an approaching train,—that is to say, that he is bound to listen for the signals and to look both ways up and down the track, to see if a train is approaching; and if he neglects these precautions and goes blindly upon the track, and is injured or killed, he himself is the cause of his own misfortune, and this as has been held even in the case of the omission to give the signals by the engineer in charge of the engine. (2) This doctrine was long ago laid down by the Court of Appeals for Quebec in the case of *Moffette v. The Grand Trunk Railway Company*, (3) and has since been recognized in a large

See 507 Ca-
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(1) Per Patterson J. in *C. P. Ry. Co. v. Fleming*, 22 S. C. R., at p. 44; *Stubley v. Lon. & N. W. Ry. Co.*, L. R., 1 Ex. 13, 20.

(2) *Davey v. London & N. W. Ry. Co.*, L. R., 12 Q. B. D. 70.

(3) 16 L. C. R. 231.

number of decisions of our Courts, and is the universally adopted doctrine in England and in the United States. It is unnecessary to go into a discussion of the numerous reported decisions, though some may be given as examples, for every such case depends upon the state of facts as disclosed by the evidence, and there are few cases which come before our Courts in which greater conflict of evidence will be found than in cases of this class. As a rule, a number of witnesses can be brought to swear that, though within hearing distance, they did not hear the signals required by the statute; while the engineer and the fireman of the train will generally be brought to swear that the signals were given. In such a case, according to strict rules of evidence, the positive testimony that the signals were given should outweigh the negative evidence of those who did not hear them; but inasmuch as the engineer is statutorily liable for one-half the penalty and damages, little weight is, as a rule, whether rightly or wrongly, given by juries or judges to his evidence; and a like suspicion is generally cast upon the evidence of the fireman, whose special duty it is to ring the bell, as neglect of such duty would in most cases lose him his position. If independent evidence can be brought, even of one or two witnesses, to the effect that they heard the signals given, there is no doubt that the correct rule would be to hold that their affirmative evidence would outweigh the negative testimony of any number of witnesses who had sworn that they had not heard the signals. (1) It is evident that the decision of such cases as these depends more upon questions of evidence than of law, for the principles of law are clear enough and are the same as govern most cases of personal injuries, that is to say, that it is purely and simply a question as to which party is in fault, according to the weight of the evidence.

As illustrating the practicable application of these principles, some of the reported cases may be here referred to.

In the case of injuries caused by collisions between the company's engines and persons crossing the track in carriages or on foot at the intersection of highways, each is exercising an equal

(1) But, as to setting aside the verdict of a jury on these grounds, see *Dublin, Wicklow & W. Ry. Co. v. Slattery*, 3 App. Cas. 1155.

legal right independent of any contract or favor extended by the one to the other. The duty of each under such conditions is to use ordinary care in the exercise of his own right to avoid injury to the other. If, notwithstanding such care by both parties an injury happens, it is a misfortune which must be borne by the sufferer alone. (1)

It is not necessary, in order to recover, that the injury should have occurred by actual collision with an engine or train crossing a highway. (2) There need be no impact, (3) provided that the injury is the direct and immediate result of the company's negligence. So where a horse takes fright at a passing engine, and, by reason of the defective state of the highway, damage is sustained, the remedy would be against the party by whose act or neglect the highway was insecure, in this case the railway company. (4) And where the engineer neglects to ring the bell until just upon the crossing, the sudden ringing of which frightens the plaintiff's horse, which was not being negligently managed, the company will be held liable. (5) In another case, a little boy was standing on a snowbank on the side of the track where it crossed a street. He saw the train approaching, and when it came opposite to where he was, it gave a jerk, which frightened him, and he slipped down on to the track, where he was run over by the train and injured. It was held that the omission to sound the whistle or ring the bell did not impose any liability on the defendants, as it in no way contributed to the accident. (6)

The authority to operate a railroad includes the right to make the noises incident to the movement and working of its engines, as in the escape of steam and rattling of cars; and also

(1) *Bender v. Canada Southern Ry. Co.*, 37 U. C. Q. B. 25; and see *Brand v. Schenectady & T. Ry. Co.*, 8 Barb 369; *Moffette v. G. T. R.*, 16 L. C. R. 231.

(2) *G. T. R. v. Sibbald*, 20 S. C. R. 259; following *G. T. R. v. Rosenberger*, 9 S. C. R. 311.

(3) But see *Atkinson v. G. T. R.*, 17 Ont. 220; *Rock v. Denis*, M. L. R. 4 S. C. 134, confirmed in review M. L. R. 4 S. C. 356.

(4) *G. T. R. v. Sibbald*, 20 S. C. R. 259; and see *Toms v. Township of Whitby*, 35 U. C. Q. B. 195; 37 U. C. Q. B. 100; *Steinhoff v. Corporation of Kent*, 14 Ont. App. 12.

(5) *G. T. R. v. Rosenberger*, 9 S. C. R. 311; *C. P. R. v. Lawson*, Cassel's Dig. 731 (1893).

(6) *Shoeburk v. Can. Atl. Ry. Co.*, 16 O. R. 515.

to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells. And they are not liable for injuries resulting from fright caused by such sounds. But if the injury resulting from the fright would not have happened but for a breach of duty by the company, it will be liable for the injury. Thus if it neglected to give the signals prescribed by statute, and thereby the traveller was brought into close proximity to the train and his horse became frightened, it is liable for the consequences. (1)

Mr. Justice Patterson, in a lengthy dissenting opinion in the case of *C. P. Ry. Co. v. Fleming* (2) expressed the view that the English cases, relating to the degree of care to be exercised by railway companies in passing crossings, were not applicable to our country, owing to the differences created by our legislation, especially as to giving warning by bell or whistle. In the court below, it appears that judgment proceeded on the idea that some level crossings may be peculiarly dangerous, and that at them the statutory signals may be insufficient. But the learned judge, dissenting in the Supreme Court, thought that when the company had adhered to the requirements of the statute, that was, under the circumstances of the case, sufficient. The majority of the Court, however, upheld the decision of the Court below, without going into details. (3) The accident in this case occurred at a city crossing; the arm of the gate which barred the crossing was raised at the time, and could not be brought down owing to the frost, but the signal man had gone on to the track, and seeing plaintiff's approach at a dangerous moment, waved his lantern and shouted to him. The plaintiff said he did not see the light or hear the bell. The defendants had kept down their speed to six miles an hour, and had properly rung the bell. The company were nevertheless held liable.

(1) *Pierce*, 348; *Robertson v. Halifax Coal Co.*, 20 N. S. 517; *Noiton v. Eastern R. R. Co.*, 113 Mass. 366; *Prescott v. Eastern R. R. Co.*, 113 Mass. 370; *Shaw v. Boston & W. R. Co.*, 8 Gray 45; *Pollock v. Eastern R. Co.*, 124 Mass. 158; *Penn R. Co. v. Barnett*, 59 Pa. St. 259; *Phil. W. & B. R. Co. v. Stinger*, 78 Pa. St. 219; *Hudson v. L. & N. R. Co.*, 14 Bush 303.

(2) 22 S. C. R. at pp. 43-44; and see per Patterson & Rose, J. J., in *Peart v. G. T. R. Co.*, 10 Ont. A. R. 191.

(3) The Quebec case of *G. T. R. v. Godbout*, 6 Q. L. R. 63, is to the same effect.

As to the conflict in the American decisions on this point, Mr. Patterson in his work, on Railway Accident Law, (1) favors the view taken by the dissenting judges in the above case.

Sec. 256 of the Railway Act applies to shunting in a station yard. (2)

It appears that the rule which has prevailed in the State of Pennsylvania, which requires that a person about to cross the track must "stop," as well as look, and listen for an approaching train, is not applicable to our country. The circumstances of every case differ from the circumstances of every other case, and it is impossible to frame a hard and fast rule applicable to every case. (3) The traveller is bound to look not only for regular trains and those stated in time tables, but as well for extra trains, or any trains beyond time. (4)

Where the defendants were negligent in not fencing a crossing, and thereby disregarded a statutory duty, yet if the proximate cause of the accident was plaintiff's own negligence, he cannot recover. (5) In the following case plaintiff showed negligence by driving on to the track without looking for the train, and while attempting to save his oxen was struck himself. The bell used by the defendants was an automatic one, but there was evidence that these bells do not always ring when the train is in motion, and that it was not ringing at the time of the accident. It was held, the Chief Justice doubting, that there was evidence of negligence for the jury. (6) In another case, where the plaintiff had approached and attempted to cross the track at a trot, without looking out, though he could have seen along the

(1) p. 162, s. 164.

(2) Hollinger v. C. P. R., 20 Ont. App. 244; Casey v. C. P. R., 15 O. R. 574.

(3) Armour, C. J., in Hollinger v. C. P. R., 21 O. R. 710.

(4) Winckler v. Great West. Ry. Co., 18 U. C. C. P. 266; Stublely v. London, etc., Ry. Co., L. R., 1 Ex. 13; Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358-362; Salter v. Utica & B. R. R. Co., 75 N. Y. 273.

(5) Winckler v. Great West. Ry. Co., 18 U. C. C. P. 251.

(6) Wilton v. Northern W. R. Co., 5 O. R. 490; Peart v. G. T. R., 10 Ont. App. 191; G. T. R. v. Godbout, 6 Q. L. R. 64; and see Davey v. London & S. W. Ry. Co., L. R. 12 Q. B. D. 70; Johnson v. Northern Ry. Co., 34 U. C. Q. B. 439; Blake v. C. P. R., 17 O. R. 177; Weir v. C. P. R., 16 Ont. App. 100; Miller v. G. T. R. Co., 25 U. C. C. P. 389; Boggs v. Great West. Ry. Co., 23 U. C. C. P. 573; G. T. R. v. Rosenberger, 9 S. C. R. 311; G. T. Ry. Co. v. Beckett, 16 S. C. R. 713.

line in either direction, it was held he could not recover, the defendant's position not being affected by their allowing cars to be on a siding, obstructing the view while the train was passing. (1) But where a freight car was allowed to remain standing for an unreasonable time upon the crossing within the limits of the street, the company will be held liable for damage to a traveller by reason of his horses becoming frightened and unmanageable on account of it. (2)

It has been questioned whether an engine and tender constitute a train within sec. 52 of R. S. C., ch. 109, so as to require a man to be stationed on the rear thereof to warn persons of their approach; (3) and an attempt appears to have been made to cover the point by an amendment to the present Act, (4) which does not, however, seem to be broad enough, for though the words "engine and tender" have been added, the provision still applies only to "a train of cars moving reversely," with the engine and tender in the rear of such train. In all these cases, there is something more to be considered than the value of a pair of horses, or even than the life of the driver, and that is, the safety of passengers lawfully using the railway, whose lives are at least of equal value. (5)

Where a railway company crosses a highway, the duty of the company is not merely to provide a crossing upon which the rails do not rise more than one inch above or sink one inch below the level; but it is also the company's duty to construct and maintain such approaches as may be necessary to enable persons using the highway to avail themselves of the crossing. (6) Therefore, where a railway company laid a plank 14 feet long outside the rail, and did not grade the road up to the plank at one end of it, but left the ends of the ties exposed, it was held that the company were liable for an accident occurring to the plaintiff's mule,

(1) *Johnson v. Northern Ry. Co.*, 34 U. C. Q. B. 432; see also *Nicholls v. Great West. Ry. Co.*, 27 U. C. Q. B. 382; see also *Rastrick v. Great West. Ry. Co.*, 27 U. C. Q. B. 396; *Weir v. C. P. R.*, 16 Ont. App. 100; *C. P. R. Co. v. Chateauvert*, 16 R. L. 28 (Q. B.); *Casey v. C. P. R. Co.*, 15 O. R. 574.

(2) *Desrousseau v. Boston & Maine*, 34 L. C. J. 252.

(3) *Casey v. C. P. R.*, 15 O. R. 574.

(4) 55-56 Vic., cap. 27.

(5) *Miller v. G. T. R.*, 25 U. C. C. P. 396, *Hagerty, C. J.*

(6) *G. T. R. v. Sibbald*, 20 S. C. R. 259; *Moggy v. C. P. R.*, 3 Man. 209.

by reason of the whiffletree catching upon one of these ties. (1) The company having made a crossing of plank 14 feet wide should have provided for the grading of the approaches being the same width, and not left them sloping off on each side of the grading within that width.

The case of *Faucher v. North Shore Ry. Co.*, (2) decided in the Province of Quebec, shows that the jurisprudence of that province is not very clear on this point. The duty of the company to use the best system of brakes and other appliances for stopping trains is not confined to the carriage of passengers, but extends to persons rightfully using or crossing its tracks. (3)

Obstructing
and inter-
rupting free
use of railway.

17. By sec. 273 no person is to walk on the line of railway, except where same is laid across or along a highway, under a penalty upon summary conviction not exceeding ten dollars. B., without the consent of a railway company, took a trolley or hand-car belonging to them, and ran upon the railway for a number of miles, at a time when, ordinarily, no train was reasonably to be expected to be running upon that part of the road. It was held by the Supreme Court of New Brunswick that he was guilty of "obstructing and interrupting the free use of the railway" under sec. 86 of the Dominion Act, 42 Vic., c. 9, though his doing so did not actually interfere with any train. (4) Foot passengers are to use foot-bridge if provided, (5) under penalty of ten dollars for offending against this provision.

Another species of accident is that of collisions occurring at the crossing of two railways. There are provisions in the Statute intended to prevent, as far as possible, the occurrence of such accidents. By sec. 257 it is provided that at every point where two railways cross each other at rail level, an officer must be stationed, and no train is allowed to pass over such crossing until a signal has been given that the way is clear. As an additional precaution, by sec. 258, every train or

(1) *Moggy v. C. P. R.*, 3 Man. 209; see also *The People v. N. Y. Cent. & H. P. R. Co.*, 74 N. Y. 302.

(2) 9 L. N. 75 (1886), *Ramsay J.* (Q. B.).

(3) *Smith v. N. Y. & H. R. R. Co.*, 19 N. Y. 127; *Gagg v. Vetter*, 41 Ind. 228.

(4) *Reg. v. Brownell*, 26 N. B. 579.

(5) Sec 274 Ry. Act.

engine is required to stop for at least one minute before crossing the track of any other railway, with the exception that where an interlocking switch and signal system or other device is used, which, in the opinion of the railway committee, renders it safe for engines and trains to pass over the crossing without stopping, the committee may give permission in writing to pass without stopping, under such regulations as to speed and other matters as the committee deems proper; but the order giving such permission may be modified or revoked at any time. Any failure on the part of the railway company to comply with those provisions of the Act would undoubtedly render them liable for any loss or damage resulting from an accident occurring in consequence.

It has been held by the Supreme Court, that it is negligent for an engineer not to apply the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand-brakes in the case of the air-brakes giving way. (1) In another case, defendants' railway crossed the track of another railway on the level, and both were bound by statute to stop at least a minute before crossing, but neither did so. Defendants' line was signalled as clear, and their train, in which the plaintiff was a passenger, went on without stopping. The other line was signalled as not clear, but the train on it ran on, disregarding this signal, and struck the defendants' train at the crossing, whereby the plaintiff was injured. If either train had pulled up about two seconds sooner, the collision would have been avoided. It was held that the defendants were liable to the plaintiff, for that their neglect to stop the required time was, as far as the plaintiff was concerned, a part of the cause of his injury and sufficiently proximate. (2) And there seems no doubt that as between themselves the negligence of the defendant company in not stopping the regulation time before crossing, although the line was signalled clear, was not sufficient to clear the other company from the results of its negligence, because by the exercise of care on their part they would have avoided the consequences of the defendants' neglect or carelessness. (3)

With reference to railway accidents generally, attention should

(1) *Great Western Railway Company v. Brown*, 3 S. C. R. 159.

(2) *Graham v. Great Western Railway Company*, 41 U. C. Q. B. 324.

(3) *Ibid.*

be called to sec. 243 of the Act, providing that passenger trains shall be provided with such known apparatus and arrangements as best afford good and sufficient means of immediate communication between the conductors and the engine drivers while the trains are in motion, and good and sufficient means of applying the brakes both to the engine and to the cars, by means of steam or otherwise, and of disconnecting the engine or any of the cars from each other, and also the best apparatus and arrangements for securely fixing the seats or chairs in the cars. And the company is subject to the orders of the railway committee with reference to such appliances, and may be compelled to alter the or supply new ones from time to time. The company are subject to a penalty of \$200 for every day during which they are in default to comply with the provisions of this section, besides their liability in damages to all persons who may be injured in consequence; and this, notwithstanding any agreement to the contrary made with any such person.

Injuries to
employees.

18. Next, with regard to accidents resulting in injury to employees of the company. The general rule, in Quebec at least, would seem to be that the company would be liable towards employees, on the same principle that they would be liable to passengers or other persons not in their employ, unless indeed the injury was the necessary result of one of the risks of employment which the employee impliedly undertook in entering into the service of the company, without there being fault or negligence imputable to the company or their officers, for whom they are responsible. (1) The Quebec Courts have refused of late years to adopt the English doctrine that employers are not responsible for injuries to their servants resulting from the fault or negligence of fellow-servants in a common employment with them, though in earlier cases it was distinctly recognized. (2) The English common law doctrine appears to have been, that where a servant was injured through the negligence of a fellow-servant working with him in the same employment, the master was not responsible,

(1) *Rich. & Ont. Nav. Co. v. St. Jean, M. L. R.*, 1 Q. B. 252; *St. Lawrence Sugar Refining Co. v. Campbell, M. L. R.*, 1 Q. B. 290.

(2) *Fuller, v. G. T. R. Co.*, 1 L. C. L. J. 68, S. C. R. 1865; *Bourdeau v. G. T. R. Co.*, 2 L. C. L. J. 186, S. C. R. 1866; *Hall v. Can. Copper & Sulphur Co.*, 2 L. N. 245, S. C. R. 1879, confirming.

providing that he had exercised due care in the selection of the servant causing the injury, and had not engaged a notoriously incompetent man. (1) Nice distinctions have been made in England as to what would constitute common employment as between different servants working for the same master, and it is now regulated there by Statute, the general principle being that to constitute common employment, the servants must be employed in the same work and of equal grade, and that the master would be responsible where injury was caused to his servant through the negligence or fault of other servants placed in authority over him by the master, such as a foreman, superintendent, or otherwise. And this would seem to be in accordance with principle and common sense; for while, on the one hand, it would be hard to say that the master should answer for the consequences of injury caused by one servant to another working together at the same job, where the fault was practically common to both, it would be equally unjust to say that the servant should have no recourse against his master where he had been injured in obeying the orders of a superior placed in authority over him by the master. A striking instance might be taken from the case of brakemen and other men employed upon a train, injured or killed through the fault or neglect of the despatcher; though in some American cases recourse has been denied to employees in such circumstances, on the ground that the injury was the result of the negligence of a fellow-servant in a common employment with them. In the present state of the jurisprudence, the Quebec Courts refuse to make any distinction between the case of an accident happening to a servant through the negligence of a fellow-servant, and an accident happening to a stranger through the same agency. The courts have refused to go beyond the length of recognizing that the servant entering upon a dangerous occupation accepts the ordinary risks of it, and cannot recover unless he can show negligence on the part of his master, as evidenced

(1) *Priestley v. Farrell*, 3 M. & W. 1; *Hodges on Railways* 661; 1 Redfield 386; *Deverill v. G. T. R. Co.*, 25 U. C. Q. B. 517; *Plant v. G. T. Ry. Co.*, 27 U. C. Q. B. 78; *Cunningham v. G. T. Ry. Co.*, 31 U. C. Q. B. 350; *O'Sullivan v. Victoria Ry. Co.*, 44 U. C. Q. B. 128; *Macfarlane v. Gilmour*, 5 O. R. 302; *Matthews v. Hamilton Powder Co.*, 14 Ont. A. R. 261; *Johnson v. Lindsay*, [1891], App. Cas. 371; *Cameron v. Nystrom* [1893], App. Cas. 308.

either by the fault of some fellow servant or defects in some machinery, material or otherwise. (1)

"Our law," said Judge Ramsay, in—*The St. Lawrence Sugar Refining Co. v. Campbell*, (2) "fortunately is unembarrassed by any artificial jurisprudence disturbing general principles. An employer is liable for any want of care on his part by which his servant is injured; and so, if he engages an unskilled person to conduct his work, and, owing to the want of skill of the person so employed, another workman is injured, the employer is responsible, precisely for the same reason he is responsible for defective machinery, or any other cause of disaster."

In Ontario the effects of the common law doctrine can be avoided by taking action under the Workmen's Compensation for Injuries Act, (3) where the injury is caused by the negligence of any person in the service of the employer who has the charge or control of any signal-points, locomotive, engine, or train upon a railway. This Act applies to all railways in the Province, whether under Provincial or Dominion jurisdiction;—the Supreme Court deciding that it was not *ultra vires* in its application to the latter railways, because the rule of law which it alters was a rule of common law in no way dependent on or arising out of Dominion legislation. (4) In actions under this subsection of the Act, it is a fair test of the plaintiff's right to recover, to consider what would be his right were the employee causing the accident to be considered the defendant in the place of the company. (5)

A switch-tender was obliged, in the ordinary discharge of his duty, to cross a track in the station yard to get to a switch, and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing so, an engine came behind him and knocked him down, with his arm under the wheels, and it was cut off near the shoulder. On the trial of an action against

(1) *Rich. & Ont. Nav. Co. v. St. Jean*, *supra*, p. 388; *Campbell v. St. Lawrence Sugar Refg. Co.*, M. L. R., 1 Q. B. 250; *Dominion Oil Cloth Co. v. Coalier*, M. L. R., 6 Q. B. 268; *Lavoie v. Drapenu*, M. L. R., 3 S. C. 304; *Ross v. Langlois*, M. L. R., 1 Q. B. 280; and in Ont. see *Hurdman v. Can. Atlantic Ry. Co.*, 22 Ont. A. R. 292.

(2) M. L. R., 1 Q. B., pp. 294-295.

(3) 1 R. S. O., c. 141, sec. 3, s.s. 5.

(4) *Canada Southern Ry. Co. v. Jackson*, 17 S. C. R. 316.

(5) *Rose, J.*, in *Brunell v. C. P. Ry. Co.*, 15 O. R. 378.

the company, in consequence of such injury, the jury found that there was negligence in the management of the engine in not ringing the bell, and in going faster than the law allowed. They also found that the plaintiff could not have avoided the accident by the exercise of reasonable care. The Supreme Court held that the Workmen's Compensation for Injuries Act of Ontario applied; and that there was no such negligence on the plaintiff's part as would relieve the company from liability for injury caused by the improper conduct of their servants; and the verdict was upheld. (1)

Another case under this Act was where the plaintiff's son was employed as fireman on a locomotive engine, which was in charge of a driver, plaintiff's son being under his orders. Plaintiff's son was severely scalded by the bursting of the boiler, from which death resulted. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to show to whom the negligence was attributable; but it was proved that, though the company held the driver responsible, as regards the engine, it was the duty of the fireman, for which he also was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver; and that, from his position, he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendant's officials, it appeared that plaintiff's son had charge of the water at the time of the accident. Defendants were held not liable. (2)

One result of taking action under the Workmen's Compensation for Injury Act is to limit the amount of compensation a workman can recover to a sum not exceeding the aggregate of his average wages for the three years preceding the accident. (3)

19. This is a maxim of the English law borrowed from the Civil Law, and its interpretation, which formerly gave rise to so much difficulty, is now considered clearly determined by the decision of the House of Lords in *Smith v. Baker*, (4) in so far as its application to the law of master and servant is concerned.

(1) *Canada Southern Ry. Co. v. Jackson*, 17 S. C. R. 316.

(2) *Brunell v. C. P. Ry. Co.*, 15 O. R. 375.

(3) Sec. 6.

(4) [1891] App. Cas. 325.

Volenti non fit injuria.

The maxim, "*Volenti non fit injuria*," said Lord Watson in that case, (1) "originally borrowed from the civil law, has lost much of its literal significance." Both the French and the English law started from the principle of this maxim, (2) as Ramsay J. put it in *Richelieu & Ontario Navigation Company v. St. Jean*, (3). "As I understand it the English law, though it expressed its rule in a somewhat more absolute form than the French law, really aimed at the same result. Both the English and the French law started from the principle "*volenti non fit injuria*." As far as the Province of Quebec is concerned, it is clear that the maxim now receives the same interpretation as that put upon it in *Smitn v. Baker*. (4)

"Lord Watson in the last mentioned case commented upon the maxim thus:—"A free citizen of Rome, who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was, in the strictest sense of the term, *volens*. The same can hardly be said of a slater who is injured by a fall from the roof of a house; although he, too, may be *volens* in the sense of English law. In its application to questions between the employer and the employed, the maxim, as now used, generally imports that the workman had either expressly, or, by implication, agreed to take upon himself the risk attendant upon the *particular* work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated, or had the means of appreciating, its danger. But, assuming that he did so, the mere fact of his continuing at work, with such know-

(1) [1891] App. Cas. at p. 355.

(2) Ramsay, J., in *Rich. & Ont. Nav. Co. v. St. Jean*, M. L. R., 1 Q. B. 261.

(3) *Ibid.*

(4) See *Ib.*, and *Ross v. Langlois*, M. L. R., 1 Q. B. 280; *Desroches v. Gauthier*, 5 L. N. 404; *Cossette v. Leduc*, 6 L. N. 181.

"ledge and appreciation, will not, in every case, necessarily imply his acceptance. Whether it will have that effect or not depends to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case." (1) And Lord Herschell distinguished the risks due to negligence on the part of the master, as follows; "Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered." (2) The question, whether the workman has so undertaken the risk, is, therefore, one of fact and not of law.

At common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. And such master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself. (3) But of course, in order that the servant may recover for injuries received, there must be negligence on the part of the master. (4).

So where a switch stand was erected in a railway company's yard close to the track, and a brakeman in their employ was aware of its position and proximity to the track; while a train was passing through the yard, this brakeman, who should have been on top of the car, was on the side, holding on to the ladder by which brakemen mount to the top of a car, and his attention being drawn towards the end of the train he did not see the switch-stand when he was struck by it and thrown under the wheels of the car, and killed;—the Court held that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover. (5)

(1) Lord Watson, in *Smith v. Baker*, [1891], App. Cas. at p. 355.

(2) *Ibid* at p. 362; and see *Hurdman v. Can. Atl. Ry. Co.*, 22 Ont. A. R. 292.

(3) *Smith v. Baker*, at p. 353, Lord Watson.

(4) *Ibid*, 366; and see *R. & O. Nav. Co. v. St. Jean, M. L. R.*, 1 Q. B. 252; *Hurdman v. Can. Atl. Ry. Co.*, 22 Ont. A. R. 292.

(5) *Ryan v. Canada Southern*, 10 O. R. 745. As to a latent defect in a brake, see *Badgerow v. G. T. Ry. Co.*, 19 O. R. 191.

Special
provisions
for the pro-
tection of
employees

20. There are provisions in the Act for the protection of employees from accidents which might occur in the pursuit of their dangerous calling. Besides those already referred to with regard to the height of bridges and tunnels, etc., (1) there are the further provisions of sec. 262, providing for the packing of frogs at crossings and switches. At every railway crossing where one railway crosses another, and at every switch, there is a space between the rails, near where they join, in which it is quite possible for persons to catch their feet; and in fact many accidents have resulted from these spaces being left open. The section referred to provides that these spaces, when less than five inches in width, shall be filled with packing up to the under side of the head of the rail, the packing being by means of wood or metal, or some other equally substantial and solid material, of not less than two inches in thickness, which must extend to within one and one-half inches of the crown of the rails, and must be neatly fitted so as to come against the web of the rails and be solidly fastened to the ties. The same provisions are made with regard to the spaces between any wing rail and any railway frog, and between any guard rail and the track rail alongside of it, which must be filled with the same packing at their splayed ends. This filling, however, may be left out with the permission of the Railway Committee from December to April in each year. The same section, paragraph 5, has a provision to lessen the danger to employees in working the engine, and requires that the oil cups, or other appliances used for oiling the valves of the locomotive, shall be such that no employee shall be required to go outside of the cab when the locomotive is in motion for the purpose of oiling the valves.

At common law, a brakeman receiving injury by coming in contact with the top of a bridge or tunnel would have no remedy against the railway company. (2) In Ontario, special provision is made in a separate Act called the Railway Accident Act, (3) whereby the employees or their legal representatives in case of death can recover damages from the railway company for all

(1) Sec. 192.

(2) *McLaughlin v. G. T. Ry. Co.*, 12 O. R. at p. 425; *Patterson Ry. Accident Law*, p. 302.

(3) R. S. O., cap. 212, sec. 6.

injuries received by such employee owing to the disregard by the company of the precautions prescribed as necessary by the Act.

In the Dominion Act, a general clause (289) has the same effect. By this clause the company are liable "to any person" injured for the full amount of damages sustained to such person by their omitting to do any matter, act or thing required to be done by the Act. And it has been decided that the term "any person injured" includes a servant of the railway company. (1)

In the Ontario Railway Accident Act, certain restrictions are put upon the right of the employee to recover in such cases. (2) For instance, in order to recover, the accident must have arisen from the negligence of the railway company, or owing to their neglect or to the neglect of anyone entrusted by them with the duty to discover or remedy the defect occasioning the injury. He cannot recover where, having known the existence of the matter, default, or negligence which caused the injury, he did not communicate his knowledge thereof to the company, unless he was aware that the railway company already knew of such cause of injury. Nor can he recover where his negligence contributed to the accident.

The words "any person" in sec. 289 of the Dominion Act, although held to include in certain cases employees of the railway company, yet must not be construed in derogation of the common law rule as to the non-liability of the master for an injury sustained by one servant through the negligence of a fellow-servant, unless, in the case of the particular act or omission provided against, such extended construction is plainly required. (3)

Sub-section 3 of sec. 192 provides that the cost of reconstructing or altering bridges shall be upon the company, municipality, or other "owner" thereof, as the case may be; but it does not say upon whom falls the obligation of making the alterations or reconstruction. It may be fairly argued, however, that where the expense falls there the obligation lies. (4) Also, the company referred to in the section is the company owning the railway, and not a lessee or company working the railway under a mere traffic arrangement. (5)

(1) *Le May v. C. P. Ry. Co.*, 17 Ont. A. R. 293.

(3) *Le May v. C. P. Ry. Co.*, 17 Ont. App. 301.

(4) *McLaughlin v. G. T. Ry. Co.*, 12 O. R. 425.

(5) *McLaughlin v. G. T. Ry. Co.*, 12 O. R., p. 426.

(2) Sec. 7.

In the case of omission on the part of the company to pack frogs sufficiently, as required by sec. 262, an employee injured thereby can recover full damages from the company under sec. 289. (1)

The interpretation to be put on sub-section 3 of the same section is that railway companies are not only required to fill with packing the spaces behind and in front of every railway frog but the space must be continuously kept filled. So, where a brakeman was killed by his foot being caught in an unpacked frog, the evidence showing that the frog had been packed at one time, but had become worn down; it was held, that the company were liable. (2)

Investigation
into accidents.

21. With reference to accidents on railways, the Act provides for Government investigation in every case. (3) The company are required, within forty-eight hours of the happening of any accident, attended with serious personal injury, or whereby any bridge, culvert, tunnel, etc., of the railway has been so damaged as to be impassable or unfit for immediate use, to give notice to the Minister of Railways, under a penalty of \$200 for every day's omission to do so. And, on the recommendation of the Minister, the Governor in Council may appoint a commission to inquire into the circumstances of the accident; and the commission are bound to report fully in writing to the Minister, giving their opinion on the matters inquired into.

But the appointment of such a commission and their report, whatever its nature, will not lessen the liability of the company in any case, where they have been guilty of negligence or omission of duty. This is provided for by sec. 288, which also provides that no inspection had under the Act, and nothing in the Act contained, and nothing done or ordered or omitted to be done or ordered under any provisions of the Act, shall relieve the company from any liability resting upon it by law.

Cattle injured
or killed on
the railway.

22. As has been pointed out (4) a railway company would not be responsible for injury to or the killing of cattle which strayed from their owner's property on to that of another, and thence

(1) *LeMay v. C. P. Ry. Co.*, 17 Ont. A. R. 293.

(2) *Misener v. Mich. Cent. Ry. Co.*, 24 O. R. 411.

(3) Secs. 267-270.

(4) *Supra*, p. 261.

on to the railway, under the provisions of the Acts previous to that now in force, on the principle that the railway company was only bound to fence, with regard to the proprietors on whose land cattle was pastured, the obligation of the railway company being towards the owner of the land upon which cattle were pastured. (1) This principle has been carried to the extent, that where the owner of horses occupied one part of a lot, and had horses pastured on another part not occupied nor belonging to him, and they escaped thence on to the railway track, the company would not be liable, as they were not bound towards the owner to fence across that part of the lot whence the horses escaped. (2) But it was pointed out that it was a question whether, under the Act of 1888, which requires the railway company to fence their property on both sides, without regard to the request of any proprietor, the same rulings would apply. Under the Act, before its amendment by 53 Vic., cap. 28, sec. 2, the company were liable for all damage done to cattle and other animals injured upon the railway having got there in consequence of the omission to make or maintain fences or cattle-guards, with the proviso that such cattle or animals were "not wrongfully on the railway." Under the Act, as it then stood, it was decided in the case of *Morin v. A. & N. W. Ry. Co.*, (3) that the provisions of the Act of 1888 had not so altered the previous law as to make the railway company liable in the case where cattle had got upon the railway from the land of an adjoining proprietor on to which they had strayed through a defect in the fences dividing the property from that of the owner of the cattle. The Court there held that these cattle, being trespassers upon the adjoining land, were wrongfully on the railway—that is to say, that being wrongfully upon the neighbor's land, and having come through the railway fence, which was out of repair, they were

(1) *Rae v. G. T. Ry. Co.*, 14 L. C. R. 142; *Roulx v. G. T. R. Co.*, *ibid* 140; *Jasmin v. O. & Q. Ry. Co.*, 6 L. N. 163; *Fouchon v. O. & Q. Ry. Co.*, 11 L. N. 74; *McLennan v. G. T. Ry. Co.*, 8 U. C. C. P. 411; *Gillis v. G. W. Ry. Co.*, 12 U. C. Q. B. 427; *Wilson v. Northern Ry. Co.*, 28 U. C. Q. B. 274; *McIntosh v. G. F. Ry. Co.*, 30 U. C. Q. B. 601; *Douglas v. G. T. Ry. Co.*, 5 Ont. A. R. 585; *Daniels v. G. T. Ry. Co.*, 11 Ont. A. R. 471; *Davis v. C. P. Ry. Co.*, 12 Ont. A. R. 724.

(2) *Conway v. C. P. R. Co.*, 12 Ont. A. R. 708.

(3) 12 L. N. 90.

equally wrongfully upon the railway; and this principle was also recognized in Ontario, in a similar case. (1) Were it not for the words "not wrongfully upon the railway," there is little doubt that the railway company would have been held liable in any case where cattle had got upon the railway through a defect in the railway fence, whether they had come directly from the property belonging to their owner, or had strayed through adjoining properties.

The Act, as now amended, however, provides that if the company omits to erect, or, when erected, to maintain such fences, etc., and in consequence any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, the company will be held liable to the owner of such animal for all damages in respect of it caused by the company's trains or engines, etc.; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining a railway, merely for the reason that the owner or occupant of such place has not permitted it to be there. (2)

It is also provided that the company shall not be held liable for injuries to cattle on their track where they have complied with all the requirements of the statute, except where such injuries are caused wilfully or negligently by the company or its employees. (3)

The duties of the owners of horses, sheep, swine, or other cattle are, that they shall not allow such cattle to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, except they be in charge of some person, to prevent their loitering or stopping at such intersection. (4) No recovery can be had from the company for the loss of or injuries to cattle at large, contrary to these provisions, killed or injured by any train at such point of intersection. (5)

At common law the owner of cattle was bound to keep his cattle within his own premises; if they strayed beyond, they were trespassers, and the duty to maintain fences in repair was only

(1) *Mackenzie v. C. P. Ry. Co.*, 14 L. N. 410.

(2) 53 Vic., c. 28, s. 2, amending Ry. Act 1888, sec. 194, sub-sec. 3.

(3) Sec. 196.

(4) Sec. 271.

(5) Sec. 271, sub-sec. 3.

as against the owner of adjoining lands. (1) The leading English case of *Ricketts v. The East and West India Docks, etc., Company*, (2) decided that the duty imposed upon railway companies by the Railways Clauses Consolidation Act, (3) as to the making and repairing of fences between their railway and the adjoining lands, is not more extensive than that imposed upon ordinary tenants by the common law. This provision of the Act was substantially the same as those of our several former Dominion Acts, (4) and the last Act as amended (5) does not seem to have materially altered the sense of the former ones, for McMahan, J., held in *Duncan v. C. P. R.*, (6) that the words "might properly be" are equivalent to "might lawfully be," and this construction was also adhered to by McDougall, J. C. C., in the very recent County Court case of *Griffith v. C. P. R.* (7)

The cases of *McLellan v. G. T. R.*; (8) *Gillis v. G. W. R. Co.*; (9) *Morin v. At. & N. W. Ry. Co.*; (10) *Davis v. C. P. R. Co.*; (11) *Daniels v. G. T. R.*; (12) *McIntosh v. G. T. R.*; (13) *Dolrey v. Ontario, Simcoe & Huron Ry.*; (14) *Conway v. Can. Pac. Ry.*; (15) *Wilson v. Northern Ry. of Can.*; (16) *McFie v. C. P. R.*; (17) and *Douglas v. G. T. R.* (18), all show that under the old Railway Act the company were only bound to fence as against adjacent land proprietors.

A New Brunswick case (19) is against this contention; but there the decision is based upon a N. B. statute, which only enjoined the erection and maintenance of fences where the railway passes through enclosed or improved land, and omitted any mention as to its relation to the occupiers of adjoining lands. (20)

(1) 1 Redfield, § 128; Pierce 401; Crowe v. Steeper, 46 U. C. Q. B. 87.
 (2) 12 C. B. 160. (3) 1845, 8 & 9 Vic., c. 20, s. 68.
 (4) Daniels v. G. T. R., 11 Ont. App. 471; McLellan v. G. T. R., 8 U. C. C. P. 411; McIntosh v. G. T. R., 30 U. C. Q. B. 601.
 (5) 53 Vic., c. 28. (6) 21 O. R. 355.
 (7) York, Feb. 2, 1892, 15 Leg. News 119.
 (8) 8 U. C. C. P. 411. (9) 12 U. C. Q. B. 427.
 (10) 12 L. N. 89. (11) 12 Ont. App. 724.
 (12) 11 Ont. App. 471. (13) 30 U. C. Q. B. 601.
 (14) 11 U. C. Q. B. 600. (15) 7 O. R. 673.
 (16) 28 U. C. Q. B. 274. (17) 2 Man. 6.
 (18) 5 Ont. App. 585.
 (19) St. John & Maine Ry. Co. v. Montgomery, 21 N. B. 441.
 (20) As to construction of Statutes in the United States regarding fencing, see Pierce 412.

In the case of one railway running parallel and contiguous to the line of another, the one on the side next which the cattle escaped is not liable for injuries thereto happening on the other line. (1)

The furthest extent perhaps to which the interpretation of our statute, as it now stands, has gone, is shown in the recent Quebec case of *Bourassa v. G. T. Ry. Co.* (2) Some time before the passing of the train, the plaintiff's nephew had opened the two gates serving to connect the two parts of plaintiff's property, which was divided by the railway track. He intended to drive the four horses from one part of the property to the other; but after the horses had passed the first gate, a sudden gust of wind blew the other gate to, and the horses, not being able to pass through, dashed along the railway line, and wandered along the track for some time until killed by a passing train. The Court was of opinion that the company, under all the circumstances of the case, should be held responsible. The accident would not have occurred if the improved Westinghouse brakes had been in use, as the cars might have been stopped in time. This case would seem to have been decided upon the general principles of the law of negligence as to highways. Had the horses been lawfully on the track at the time, instead of being trespassers, the company might have owed to the proprietor of the animals the duty of providing their trains with the most improved system of brakes then in use. (See Ry. Act, sec. 243). But they owed them no such duty. A railway company, at the common law, is under no other or different obligation respecting the premises occupied by it than any other owner or occupant of real estate. (3) The first and paramount duty of the company is to their passengers. They regulate the general speed of their trains on the assumption that they will find the track free from obstructions. If they are to bring their train to a standstill every time they meet with cattle trespassing on the track, they would,

(1) *Fouchon v. Ont. & Quebec Ry. Co.*, 11 L. N. 74; *Daoust v. C. P. R. Co.*, 15 L. N. 382; as to whether a highway running alongside a railway can be considered as the land of an adjoining proprietor, see *Daniels v. G. T. Ry. Co.*, 11 Ont. A. R. 471.

(2) 30th Oct., 1893, S. C., *Mathieu, J.*, 1 M. L. D. & R. 591; reversed in appeal.

(3) *Wood* 1543; *Pierce* 401, 402; *Lambert v. G. T. R.*, 28 L. C. J. at p. 4.

in effect, be subjecting the management of their road, and the persons and property in their charge, to the control of wrong-doers, and holding out a premium to them for wrong-doing, and greatly increasing the chances of a collision. (1) "Want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensues from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." (2) "The company is not under an obligation to trespassers to use the appliances most efficient for safety. (3) Thus horses had strayed on to the track, and the person in charge from whom they had escaped, was driving them towards the crossing, when a train, which was approaching, drew up for a time, the rear cars being on the crossing, and then the track being clear, the engine driver sounded the whistle for brakes off, and proceeded. The horses had then come nearly abreast of the engine, but alarmed by the whistle and motion of the train, they turned and ran towards a bridge. They got upon the bridge before they could be stopped, when some were injured and others killed. It was held that the defendants were not liable; there was no evidence of negligence in the manner in which the train was started; the defendants were using their own property as of right and in a lawful way, and no duty was cast upon the engineer to wait until the horses had been entirely driven off their premises. (4)

And the same principle was laid down in another similar case, where two horses had strayed on to the track, and were running ahead of the engine. Steam was shut off, speed slackened, and the whistle blown. On whistling, the horses ran off the track, speed was then increased, they ran on again, and two were caught in a

(1) *Hurd v. G. T. R.*, 15 Ont. A. R. 72; *Pierce*, 406.

(2) *Hurd v. G. T. R.*, 15 Ont. A. R. 69.

(3) *McKenna v. New York Cent. & H. R. R. Co.*, 8 Daly 304.

(4) *Hurd v. G. T. R.*, 15 Ont. A. R. 58.

culvert. The engineer again called for brakes, it was a down grade and the train could not be stopped till the horses were killed. It was held that the defendants were not liable. (1)

Burden of proof.

23. The following cases may be cited as showing on whom the burden of proof is in such cases. Where plaintiff's cattle, having been in his yard at nine o'clock one evening, were discovered about ten o'clock the next morning lying wounded alongside the defendant's line of railway, it was held that it could be fairly inferred that the injury was caused by an engine or cars running upon the defendants' railway, and under the control of the defendants' servants. (2) Where a passenger on the train saw the conductor and some of the other men employed on the train, examining a mare which was lying at the foot of an embankment near the railway, and unable to rise without assistance, and early next morning the plaintiff's mare was found dead near the same place, with several of her ribs broken, and that she had been grazing about there the previous evening, and was then uninjured; it was held that there was sufficient to leave it to the jury whether the mare which the conductor of the train was examining the previous night was the plaintiff's mare. (3) Where a horse was found dead near the railway track of the defendants, and the evidence did not disclose in what manner the animal had been killed, but it appeared the fence adjoining the track was in good condition and that the gate therein leading to the track was frequently left open by persons passing through, the defendants were held not liable. (4)

The fact that an accident has occurred is not of itself evidence of negligence; the plaintiff must give affirmative evidence of negligence on the part of the railway company, and if the fact of negligence is left doubtful, the defendants are entitled to a verdict. (5)

(1) *Auger v. Ontario, Simcoe & Huron Ry. Co.*, 9 U. C. C. P. 164; and see *Campbell v. Great Western Ry. Co.*, 15 U. C. Q. B. 498; *Connors v. Great Western Ry. Co.*, 13 U. C. Q. B. 401; *Falconer v. European & N. Amer. Ry. Co.*, 1 Pags 179; *McFie v. C. P. R.*, 2 Man. 6.

(2) *McMillan v. Man. & N. W. Ry.*, 4 Man. 220.

(3) *N. B. Ry. Co. v. Armstrong*, 23 N. B. 193.

(4) *Lambert v. G. T. R. Co.*, 28 L. C. J. 3.

(5) *Falconer v. North American Ry. Co.*, 1 Pags. 179; *Wood*, 1566; *Lambert v. G. T. R.*, 28 L. C. J. 3; *Phelps v. Great East. Ry. Co.*, 21 L. T. 443; *Hammock v. White*, 11 C. B. (N. S.) 588; *Cornman v. Eastern Counties Ry. Co.*, 4 H. & N. 781; *Toomey v. London & Brighton Ry. Co.*, 3 C. B. (N. S.) 146.

Where the fences have been accidentally destroyed by fire after the track inspector has made his daily inspection, and the fact is not known until after the injury has been done, the company is not guilty of negligence. (1)

Where the evidence shows that the stock killed had entered upon the track on a line of fence that was generally insecure, it is not necessary that it also show that the particular part thereof over which the stock passed was insecure. (2)

24. This question of the liability of railway companies for injury to cattle or animals on the track arises also in connection with accidents occurring through animals getting on to the track from the highway, and the liability of the company in such cases is governed by the interpretation to be put upon sec. 271 of The Railway Act, read in connection with sec. 194. Cattle at large on the highway.

This provision of The Railway Act has been in force for many years, and until very recently, the jurisprudence has been uniform, that the owner of cattle straying on the highway, and thence getting on to the track, and being there injured or killed, even though not at the point of intersection, would have no recourse against the railway company. For instance, as far back as 1852, in the case of *Rocheleau v. The St. Lawrence & Atlantic Ry. Co.*, (3) it was held that a railway company was not liable for the killing of cattle straying on to the railway from the public road, and that persons allowing their cattle so to stray were liable to the company for damage to cars thrown off the track by collision with such animals. The difficulty in the interpretation of this section of the Act is that the denial of action according to the literal wording of the Act is only in the case where animals are killed or injured "at the point of intersection," that is to say, being on the highway at the point intersected by the railway. According to this section of the Act, cattle or animals on the railway at the point of intersection, being at large and not in charge of any person, would be unlawfully or wrongfully upon the railway, as having come from a place where they might not properly be; and if being so unlawfully or wrongfully upon the

(1) Toledo Can. South, etc., R. R. Co. v. Elder, 45 Mich. 329.

(2) Louisville, etc., R. R. Co. v. Spain, 61 Ind. 460.

(3) 2 L. C. R. 337.

railway, they strayed up or down the track in either direction, it would naturally seem as if they were still wrongfully or unlawfully upon the railway, and that therefore the railway company would not be liable should they be killed; for, referring back to sec. 194, the liability of the company would depend upon two questions, namely, 1st, whether the animals had got on to the railway in consequence of an omission to make and maintain cattle guards or fences; and 2nd, as to whether they had got on to the railway from a place where they might properly be.

In Ontario, the jurisprudence is settled, that in the case of animals so straying, the owner has no recourse, whether the cattle were killed at the point of intersection or not. The following cases shew how the principle has been there applied. In *Ferris v. The Grand Trunk Ry. Co.*, (1) it was held that, where the plaintiff's horse escaped from a field into a street, within half a mile of the railway, and thence strayed on to the track, the company were not responsible, although the horse was not killed at the very point of intersection. And it is proper to observe that when this case was decided, the Act did not contain the proviso that the railway company should only be responsible where the animals were not unlawfully upon the railway. In another case of *Simpson v. The Great Western Ry. Co.*, (2) the same principle was applied where a horse had been seized by the sheriff, and placed in a stable adjoining the public road, from which it escaped on to the highway, and thence got on to the railway through defects in the cattle-guards. There it was decided in the same sense, that the owner could not recover, as the horse was unlawfully upon the highway, even though it had been placed in the stable in question without the consent of the owner. The same principle was affirmed in a later case of *Thompson v. The Grand Trunk Ry. Co.*, (3) where a horse was killed after having strayed from the highway on to the track, and it was held that the neglect to ring the bell and sound the whistle as required by the Act on approaching the crossing would not make the company responsible, on the evident principle that the animal not being in charge of any person, the omission to give the signals

(1) 16 U. C. Q. B. 474.

(2) 17 U. C. Q. B. 57.

(3) 18 U. C. Q. B. 92.

required by the Act would not necessarily have averted the accident. Following up the principle that the animals must be in charge of some person, so as to prevent their loitering or stopping on the highway at the intersection of the railway, it was held in a case of *Cooley v. G.T.R. Co.*, (1) that where horses were being driven in front of a servant of the owner, but not held by any bridle, halter, or otherwise, and got upon the railway track through the cattle-guards being filled up with snow, the horses were not in charge of any person within the meaning of the Act, and that consequently the owner could not recover, because the servant so driving them had no control over the animals. This principle was re-affirmed in a later case of *Markham v. The Great Western Ry. Co.*, (2) and has recently been again upheld in the late case of *Daniels v. G.T.R. Co.*, (3) where sheep straying on the highway got through a defective fence on to land belonging to the railway company adjoining its track and used as a gravel pit, and thence on to the railway, where they were killed. The company were held not liable, on the ground that there was no duty cast upon them as towards the owner of the sheep to fence their land adjoining the highway.

The Court of Appeals in Quebec at one time departed from the principles laid down in the Ontario cases and the earlier Quebec cases, and held in the case of *Pontiac Pacific Junction Ry. Co. v. Brady*, (4) that where animals had strayed upon the railway track from the highway, through defective cattle-guards, the company were responsible for their being killed by a passing train, on the ground that the accident was due to the omission of the railway company to make proper cattle-guards; and that the question of their being unlawfully on the highway with regard to the public did not affect the railway company's responsibility. The principle upon which this case went was that the animals not having been killed at the point of intersection, but having strayed along the track through want of cattle-guards, which they could not have done if the cattle-guards had been there, their killing was directly due to the omission of the company to provide proper cattle-guards. This case was decided under the pro-

(1) 18 U. C. Q. B. 96.

(3) 11 Ont. A. R. 471.

(2) 25 U. C. Q. B. 572.

(4) M. L. R., 4 Q. B. 346.

visions of the Consolidated Railway Act of 1879, in force previous to the present Act; but in a subsequent case, (1) the Superior Court gave a similar decision under the present Act.

In that case, the learned judge in the Superior Court said :—
 “ If the colts had been killed at the point of intersection—even if there without plaintiff’s knowledge—I am disposed to think that the provisions of the Railway Act would have been applicable. But they were killed some distance down the track, at a place to which they had gone, in consequence of defendant’s neglect to build a proper fence and cattle-guard to prevent them.” (2)

This judgment of the Superior Court was, however, reversed in appeal, on the ground that the horses were unlawfully on the highway, and, therefore, got on to the railway from a place where, in the language of the statute, they might not properly be. (3)

As Weatherbe, J., said in *Whitman v. The W. & A. Railway Co.*, (4) “ The clause of the Act (5) requiring cattle-guards at crossings cannot be, I am clearly of opinion, construed to render the company liable at all events, and against owners of cattle unlawfully on the highway.”

When cattle are lawfully passing upon the highway, at its intersection with the railway, the company are bound to exercise ordinary care to prevent injury to them. The company and the owner are, in such case, each exercising an equal right. The company are bound to use ordinary care to prevent injuries to cattle which are rightfully upon private crossings established by law or agreement; but the plaintiff’s contributory negligence will defeat the action. (6)

(1) *Cross v. C. P. Ry. Co.*, Q. R., 2 S. C. 365.

(2) *Cross v. C. P. Ry. Co.*, 2 S. C. at p. 368. See, on this point, *Phillips v. C. P. Ry.*, 1 Man. 113; citing *Thompson v. G. T. Ry.*, 37 U. C. Q. B. 40, and others; *Duncan v. C. P. Ry.*, 15 L. N. 15; *Nixon v. G. T. Ry.*, 16 L. N. 59; *Groulx v. C. P. Ry.*, Q. R., 3 S. C. 81; also *Desy v. C. P. Ry. Co.*, Q. R., 4 S. C. 134; *Langevin v. C. P. Ry.*, *Bourgeois, J., C. Ct.*, Three Rivers, 15th March, 1893.

(3) Q. R. 3 Q. B. 170; and see *Campbell v. G. T. Ry. Co.*, *ibid.* p. 570.

(4) 6 Russ & Geld. 271.

(5) Ry. Act, Nova Scotia, 1880; same as Dominion Act in this respect.

(6) *Pierce* 405. *Bender v. Can. South. Ry.*, 37 U. C. Q. B. 25, where the relative rights and duties of railway companies and landowners, with regard to the use of farm crossings, are considered. *Campbell v. Great Western Ry. Co.*, 15 U. C. Q. B. 498; *Tyson v. Grand Trunk Ry.*, 20 U. C. Q. B. 256; *Renaud v. Great Western Ry. Co.*, 12 U. C. Q. B. 408.

The rate of speed, and the necessity there might be of giving warning of the approach of a locomotive, must depend on the nature of the crossing, the frequency or infrequency of its use—the purpose for which it is used, whether only for human beings or for them and for cattle also, or chiefly for cattle—for, in the case of cattle, unconscious of the danger, there would be more difficulty in hurrying them over, especially when many of them were huddled together, than if human beings were passing—the formation of the ground, and, whether from that or from any other cause, natural or artificial, the place of crossing could be seen at such a distance from the engine that its speed could be checked, or be altogether stopped in case of danger being imminent (1)

The mere sounding of the whistle, as required by the Act (2) is not sufficient to exonerate the company from blame; (3) and where a train, in approaching a crossing, neglects to give the proper signals, the company will not be relieved from liability because the person whose cattle were run over did not take the best means to avoid the accident, or because his horses were unmanageable. (4)

26. Any by-law of a municipality intending to alter the common law so as to prevent horses, cattle and other animals to run at large, must be clear and unequivocal in its language as to such permission. (5) It must be affirmative. (6)

27. The principle of the English law with regard to the liability of railway companies for damages caused by sparks emitted by their engines is very clearly laid down in the recent decision on this point in the House of Lords. In the case of *The Port Glasgow & Newark Sailcloth Company v. The Caledonian Railway*

(1) *Bender v. Can. South. Ry. Co.*, 37 U. C. Q. B. at p. 32; *Cliff v. Midland R. Co.*, L. R., 5 Q. B. 261; *Bilbee v. London, Brighton & South Coast R.*, 18 C. B. N. S. 584.

(2) Sec. 256.

(3) *Campbell v. Great Western Ry. Co.*, 15 U. C. Q. B. 498.

(4) *Tyson v. G. T. R.*, 20 U. C. Q. B. 256.

(5) *Jack v. Ontario, Simcoe & Huron Ry. Union Co.*, 14 U. C. R. 328; *Crowe v. Steeper*, 46 U. C. R. 87.

(6) *Duncan v. C. P. R.*, 21 O. R. 355; *Daniels v. G. T. R.*, 11 Ont. App. 471.

Company, (1) decided in 1893, the Lord Chancellor (Lord Herschell) stated that: "It is now well settled law that in order to establish a case of liability against a railway company under such circumstances, it is essential for the pursuers to establish negligence. The railway having the statutory power of running along the line with locomotive engines, which in the course of their running are apt to discharge sparks, no liability rests upon the company merely because of sparks emitted by an engine having set fire to adjoining property. But the defenders, although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test, whether they exercise this power reasonably and properly, appears to me to be this: they are aware that locomotive engines running along the line are apt to emit sparks. Knowing this, they are bound to use the best practicable means, according to the then state of knowledge, to avoid the emission of sparks which may be dangerous to adjoining property; and if they, knowing that the engines are thus liable to discharge sparks, do not adopt that reasonable precaution, they are guilty of negligence, and cannot defend themselves by relying upon their statutory power. About the law as I have expressed it, I do not think there is any controversy." In this particular case it was held that the failure to use spark arresters, the same having gone out of use, was not, in the absence of proof by the pursuers, evidence of negligence on the part of the defenders.

In Redfield, on Railways, (2) the English doctrine seems to have been misunderstood, for after stating it to be "that the fact of premises being fired by sparks emitted from a passing engine is *prima facie* evidence of negligence on the part of the company," the author proceeds to say: "But in this country (America), it must be confessed, the rule of the liability of railways for damage done by fire communicated by their engines, is more favorable to the companies than in England. It seems to have been assumed in this country, that the business of railways being lawful, no presumption of negli-

(1) 30 Scot. Law Rep. 587. See also *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679.

(2) Edit. of 1887, p. 470, § 125, sec. 1.

"gence arises from the fact of fire being communicated by their engines." (1) This is exactly the present English rule.

The rule itself is very clear, but is difficult of application, and is sometimes considerably modified in its application to particular cases. In this country we may begin our consideration of the jurisprudence with a recent Supreme Court case. (2) There it was proved that at a certain hour a train passed the property injured by fire, and two hours afterwards another passed. After the passage of the latter, fire was discovered on the adjacent land. It was shown that the engine of the first train was in a defective state, and likely to throw dangerous sparks, while the second engine was in good repair. It was held that there was sufficient evidence to justify the jury, in finding that the inference was that in the absence of any evidence that the fire came from the second engine, it came from the engine out of order. Henry, J., thought this case presented much difficulty, for the last engine might possibly have emitted sparks which caused the damage. If so, the company would not be liable, as that engine was provided with the usual appliances for preventing the escape of sparks. (3)

In a former case this Court (4) had to determine another question, and one of great difficulty. It was held that railway companies are responsible for all damage arising from their default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons, by a fire communicated thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith. The decisions in the United States are conflicting upon this point, but Mr. Justice Cooley has expressed himself in favor of the view held by the majority of the Court in this case. (5)

(1) *Ibid.*, sec. 6.

(2) *Can. Atl. Ry. Co. v. Moxley*, 15 S. C. R. 145.

(3) And see *Glasgow & London Inq. Co. v. C. P. Ry. Co.*, 31 L. C. J. 1.

(4) *Canada Southern Ry. Co. v. Phelps*, 14 S. C. R. 132.

(5) Cooley, *Torts* p. 77.* And see *Sherman & Redfield* on negligence, 4th Ed., pars. 29, 30, 666; in Quebec, see *Fordyce v. Kearns* 15 L. C. J. 80; *Dawson v. Trestler*, 2 Q. B. R. 115; and in France, 5 *Rolland de Villargnes Vo. Incendie* Nos. 37-39, 6 *Toullier* No. 286, 11 *do.* Nos. 155-172; *Dalloz, Vo. Dommage-Destruction* Nos. 49-51; *Richard et Maucorps, responsabilité civile en matière d'incendie*, Nos. 27, 32, 705.

But in a case quite similar (1) to this, where the fire began by burning some wood in one of the company's wood sheds, which was also destroyed, and from these by the force of a strong wind the fire was carried to, and consumed the plaintiff's property, which was distant about 130 feet from the shed, it was held in New York that the plaintiff had no cause of action against the company.

Later, the same court, composed partly of other judges, decided that where coals were negligently dropped from the company's engine, which set fire to a tie, from which the fire spread to an accumulation of weeds, grass and rubbish lying on the road, and from those spread to a fence, and into plaintiff's woodland, and burnt and destroyed his trees, the plaintiff was entitled to recover. (2) But Mr. Justice Henry, in *Canada Southern Ry. Co. v. Phelps*, (3) pointed out in his dissenting opinion, that the later New York case was distinguishable from the other. In that case, through the negligence of the company, the means for the spreading of the fire on their own property existed, by which the fire spread to their fence, and then into the land of the plaintiff. The spreading of the fire from the tie was therefore from a cause for which the company could be held answerable. "In the present case," he said "it is not shown, that through the negligence of the appellants, the means for the spreading of the fire from the station house to that of the respondent existed. In fact, the opposite is shown, for there was no combustible matter shown to have existed by which the fire could spread to the barn and house of the respondent." And Mr. Justice Gwynne intimated that where a fire spreads from house to house for a long distance there might be circumstances intervening which would relieve the company from liability. This would undoubtedly be so if there were a new and independent cause intervening, but apparently not otherwise. (4)

(1) *Ryan v. The New York Central Ry. Co.*, 35 N. Y. 209.

(2) *Webb v. The Rome, Watertown & Ogdensburg Ry. Co.*, 49 N. Y. 420; and see *Kerr v. Penn. Ry. Co.*, 62 Penn. 353; *Flannigan v. C. P. Ry. Co.*, 27 O. R. 6; *Ball v. G. T. Ry. Co.*, 16 U. C. C. P. 252; *Smith v. London & South Western Ry. Co.*, L. R., 5 C. P. 98, L. R., 6 C. P. 14; *Hewitt v. Ont., Simcoe & Huron Ry. Co.*, 11 U. C. Q. B. 604.

(3) 15 S. C. R. at p. 151.

(4) *Whartan, Negligence* (Ed. of 1874) § 154; *Field, Negligence*, (Ed. of 1876) p. 531 *in notis*.

The rule in regard to the responsibility in such cases is thus expressed by Pollock, C. B. : (1) " I am disposed not quite to " acquiesce to the full extent in the proposition, that a person " is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition " so universally ; but of this I am quite clear, that every person " who does wrong is at least responsible for all the mischievous " consequence that may reasonably be expected to result, under " ordinary circumstances, from such misconduct." (2)

As to the question of what is or is not negligence in the running of the engine, it was held in the Supreme Court (3) that the use of wood for fuel was not in itself evidence of negligence. In a recent English case (4) plaintiff's cart with a load of straw was passing over a bridge, when the defendants' locomotive underneath emitted a number of sparks, with the result that the straw blazed up, and so rapid was the destruction of the straw and cart that the horses were barely saved. The judge instructed the jury that the construction of the engine not having been questioned, there was no liability on the part of the defendants, unless the plaintiff could show there had been carelessness in working the engine. The jury, however, found for the plaintiff for the full amount claimed.

Where a train was allowed to run for ninety miles without the ash-pan having been emptied, and ignited substances were found upon an adjacent manure heap which were too large to pass through the net of a smoke stack, it was held that there was sufficient evidence to go to the jury to find whether the fire escaped because the pan was full, and that the result might with reasonable care have been avoided. (5)

The question of the contributory negligence of the plaintiff in regard to the object burned is also a subject possessing considerable difficulty.

Chief Justice Sir J. W. Ritchie, in the case of *The New Brunswick Ry. Co. v. Robinson*, (6) expressed the view that if the

(1) *Rigby v. Hewitt*, Exch. 240.

(2) See also *Pennsylvania Ry. Co. v. Keir*, 62 Penn. 353; *Morrison v. Davis & Co.*, 8 Harris 171; *Kellogg v. Chicago & N. R. Co.*, 26 Wis. 223.

(3) *New Brunswick Ry. Co. v. Robinson*, 11 S. C. R. 688.

(4) *Rimmer v. London & North Western Ry. Co.*, 15 L. N. 366.

(5) *McGibbon v. Northern Ry. Co.*, 14 Ont. A. R. 91.

(6) 11 S. C. R. 688.

plaintiff chooses to place in his barn combustible materials, and to leave it in such a condition that such combustible materials are exposed to sparks from the engine, provided with all the usual and requisite appliances for preventing the escape of sparks, and if an accidental spark should ignite such combustible material and cause the destruction of the barn and its contents, the owner must submit to the risk, as a consequence of the legislature having permitted the use of a dangerous agent. There are reciprocal duties imposed as well on those who have combustible material near to the railway, as on the railway company to use reasonable care and precaution. The correct rule was laid down in *Collins v. N. Y. Central & Hudson River Ry. Co.*, (1) viz. : " that one whose property is exposed to risk or injury from or by reason of its location, as where it is situated in a position of constant exposure to fire on the side of a railroad, must use such care as prudence would dictate in view of the unavoidable perils to which it is subjected."

Mr. Justice Strong, however, dissented from this view, and referred to two American cases in support. (2) The other judge expressed no opinion. And in a later New Brunswick case, (3) where the facts were very similar, it was held that where the sills of a barn rested on blocks and were about eight inches above the ground on which the hay rested, so that part of it was exposed below the sills, this was not evidence of contributory negligence on the part of plaintiff. From this opinion the Chief Justice and Wetmore, J., dissented, agreeing with Ritchie, C. J., in *N. B. Brunswick Ry. v. Robinson*. But in a recent Scotch case, (4) where a flax store, situated in close proximity to a railway, had no windows, and when light was required it was obtained by opening the doors of the store, and on one occasion when two doors were open, one on the next side to, and one on the side away from, the railway, a spark from a passing engine was blown in at the former, and falling among some loose flax, caused a fire, which destroyed the store ;-- it was held that the plaintiffs were

(1) 5 Hun 503.

(2) *Fero v. Buffalo, etc., Ry. Co.*, 22 N.Y. 209 ; *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454-473.

(3) *Campbell v. McGregor*, 29 N. B. 644 (1889).

(4) *Port Glasgow Sailcloth Co. v. Caledonian Ry. Co.*, 29 Scot. Law Rep. 577 (1893).

not barred by contributory negligence from claiming damages. (1)

As to whether the Statute 14 Geo. 3, ch. 78, sec. 86, in force in Ontario, enacting that "No action, suit or process shall be had, maintained or presented against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding"—applies in these cases, it was held in *The Canada Southern Railway Company v. Phelps*, (2) that it in no way relieved persons from liability for their own negligence or from responsibility for the negligence of their servants.

Where a railway company incorporated under the laws of Ontario, granted running powers over their line to a foreign company, it was recently held by the court of Appeals for that province, that the Ontario company could not, without legislative sanction, confer upon such foreign company the immunities and privileges they possessed, and the foreign company would be subject to the common law liability imposed upon a person using a dangerous and fire emitting machine, and held liable in damages without proof of negligence. (3)

27. In the *Canada Atlantic Ry. Co. v. Moxley*, (4) it was held (Henry, J., dissenting) that the locomotive superintendent and locomotive fireman of a railway company are "officers of the corporation," who may be examined as provided in R. S. O. (1877), c. 50, s. 136, and the evidence of such officers as to the condition of the respective engines, and the difference as to danger from fire between a wood-burning and a coal-burning engine, taken under said section, was properly admitted in the trial of this cause; and certain books of the company containing

Evidence in such case s

(1) This case went to the House of Lords, and it was there decided that the company was not negligent, 30 Scot. Law Rep. 587; and see *Can. Central Ry. Co. v. McLaren*, 8 Ont. A. R. 564, Confirmed in P. C., Robinson's Dig. 1882-1884, pp. 682-683; *Hill v. Ontario Simcoe & Huron Ry. Co.*, 13 U. C. Q. B. 503.

(2) 14 S. C. R. 132.

(3) *Welleans v. Can. Southern Ry. Co.*, 21 Ont. A. R. 297.

(4) 15 S. C. R. 146; see also *McLaren v. Can. Cent. Ry. Co.*, 8 Ont. A. R. 564.

statements of repairs required on the engines in question, among others, were also properly admitted in evidence without calling the persons by whom the entries were made.

The rule in Quebec as to damage by fire.

28. The jurisprudence in Quebec, though showing a considerable variance, has a tendency to reject the principle of the English law that railway companies, being authorized by the Legislature to use locomotive engines, are not liable for damage caused by fire from sparks issuing from the same, provided they have taken every precaution in their power, and adopted every means which science can suggest, to prevent injury from fire, and are not guilty of negligence in the management of the engine. (1)

The Quebec Courts have leaned rather towards the doctrine adopted in France, that railway companies are responsible for damage from fire caused by their engines, notwithstanding that every possible precaution and device has been resorted to to prevent the issue of sparks;—in other words, whether there is negligence on the part of the railway company or not. (2)

The earliest case of importance bearing upon this question is that of the *Quebec Fire Assurance Company v. St. Louis*; (3) where the Privy Council, on an appeal from Quebec, held the proprietor of a steamboat responsible for damage resulting from sparks escaping from the smoke-stack of the steamboat, on the ground that the pipe was not provided with a proper screen or spark arrester. This decision would appear to place the liability upon the question as to whether there was negligence or not, apart from any question as to the immunity of railway companies exercising their statutory powers without negligence. This decision, however, does not seem to have had much weight with Quebec Courts, as will be seen from the following review of the jurisprudence:—

In 1882, in a case of *Jodoin v. The South Eastern Railway Company*, (4) the Superior Court held, that notwithstanding that the company were authorized to work the railway by public statute of the province, and had taken all possible precautions

(1) *Vaughan v. Taff Vale Railway Co.*, 5 H. & N. 679; see *supra* pp. 85, 187.

(2) *Dalloz* 1859-2-187; 2 *Sourd* at No. 1054; 12 *Demolombe* p. 142; 6 *Laurent* Nos. 148 and 149; 2 *Aubry & Rau*, No. 194; *Palaa des Che. de Fer*, Nos. 602, 603.

(3) 7 *Moore* 286.

(4) *M. L. R.* 1 S. C. 316.

by providing the locomotive pipe with an approved appliance for preventing the escape of sparks, they were liable for the damage occasioned by the sparks escaping from the pipe; the Court citing from Dalloz, (1) and adopting the French rule as there expressed, and holding that it was applicable under Art. 1053 of the Quebec Civil Code. The reasoning by which this holding was arrived at is not very evident, inasmuch as the liability under Art. 1053 is clearly placed upon the basis of fault or negligence.

This decision of the Superior Court was followed by another of the Court of Appeals, in the case of the *Grand Trunk Railway Company v. Meegan* (2) decided in 1885. In that case, Cross, J., rendering the judgment of the Court, after referring to the company's defence that they had adopted every precaution by known appliances to prevent the escape of sparks, and that, consequently, they were not liable, said: "This raises a very important question, and probably by the rule of the English Law applicable to the case, the company might be held excused, but I believe our rule has always been different. Our courts have continually held that a party exercising a dangerous occupation is responsible to his neighbors for the damage that may be caused to them by the hazardous nature of such occupation." The only case cited by the learned judge was that of *The Quebec Fire Assurance Company v. St. Louis*, (3) which certainly did not hold the defendant liable on the grounds stated by the learned judge, but distinctly held that his liability was on account of negligence. The learned judge also referred to the case in *Dalloz*; (4) but it should be remarked that the railway legislation in France is very different from that of this country; and there is a provision in their statute law which has been held to have the effect of making railway companies liable for all damage which they may commit in the operation of the railway, whether operated negligently or not. (5)

In a subsequent case of *Dussault v. The North Shore Railway Company*, (6) decided in 1886, the Court of Appeals held that a railway company are responsible for damages caused by fire started by sparks escaping from the smoke stack of one of

(1) 1859-2-187.

(3) *Ubi supra*.

(5) 2 Sourdut No. 1054.

(2) M. L. R., 1 Q. B. 364.

(4) 1859-2-187.

(6) 14 R. L. 207; 12 Q. L. R. 50.

their engines, when by the closing of the damper the emission of sparks could have been prevented, thus apparently putting the liability on the ground of negligence.

In 1889, however, Mr. Justice Andrews, in the Superior Court, in the case of *Leonard v. The Canadian Pacific Railway Company*, (1) returned to the doctrine of the French law, and distinguished the case of *Robinson v. The New Brunswick Railway Company*. (2) The learned judge said: (3) "If it be admitted that the defendants have used the best and safest engines obtainable, I think they are nevertheless liable, on the same principle on which anyone exercising a calling dangerous to his neighbors would be condemned to repair any damage he might thereby cause, even though his calling were lawful, and he had used his best endeavors to render it harmless."

In the same year (1889), the Court of Appeals, in the case of *The North Shore Railway Company v. McWillie*, (4) rendered a decision which appears to have been based purely upon a question of fact as to whether the fire had been caused by sparks coming from the locomotive; and the question at issue is only incidentally touched upon by Church, J. in his opinion, where he says: (5) "The defendants also seek to avoid responsibility on the ground that their locomotive was protected as far as possible, and that the screen was in good order, they bringing into Court two or three experts to say they never knew a locomotive so protected to cause damage; but the testimony of these men is overborne by the direct and positive evidence of the persons who witnessed the whole occurrence, and who prove that the fire was caused by the sparks from the train. We think, therefore, the company was properly held responsible." The judgment of the Court below, however, so confirmed, was based upon the rule laid down in the case of *The Grand Trunk Railway Company v. Meegan*. (6) The learned judge in the Superior Court, after referring to the French law with regard to the obligation to use one's property so as not to do injury to one's neighbor, expressed himself as follows: (translated) "Without doubt the operation of railways is in the public interest, and their

(1) 15 Q. L. R. 93.

(3) 15 Q. L. R., at page 95.

(5) M. L. R. 5 Q. B., at page 142.

(2) 11 S. C. R. 688.

(4) M. L. R., 5 Q. B. 122.

(6) M. L. R., 1 Q. B. 364.

note
and others

"neighbors are obliged to suffer the ordinary inconveniences resulting therefrom, such as the ordinary noises which are made by passing locomotives and trains, etc., but that does not go so far as to render railway companies exempt from responsibility for fire caused by sparks. This is not an ordinary inconvenience resulting from the operation of railways." (1) ~~This case went to the Supreme Court, (2) where the judgment of the Court of Appeals was confirmed on the question of fact; no reference being made by any of their Lordships to the question under discussion, though the holding of the case as reported is that there was sufficient evidence of negligence to make the railway company responsible for the damage caused by the fire.~~

In a later case, in 1891, the Court of Appeals of Quebec again held a railway company liable under like circumstances; (3) and in a still more recent case, in 1893, (4) the same court dismissed the action against the railway company, on the ground that the proof did not establish that the fire was started by sparks from the locomotive. The formal judgment of the Court, however, gives as a reason for the dismissal of the action, that the proof did not shew that the fire resulted from any act, imprudence, or want of skill on the part of the railway company;—quoting the very language of Art. 1053 of the Quebec Civil Code.

The most recent decision on this point is that of the Superior Court in the case of *Senésac v. The Central Vermont Railway Company*, (5) where the action was dismissed, on the ground that there was no proof of fault or negligence on the part of the railway company. It seems to the author that this decision enunciates the true doctrine which should be adopted in such cases, and that the railway company's liability must depend upon the presence or absence of negligence in the operation of the railway; they being held to the strictest possible diligence, consistent with the practical operation of the railway, in the exercise of their statutory powers; and that so long as these powers are exercised without negligence, and with all due and proper precautions, the company should not be held liable. (6)

(1) M. L. R., 5 Q. B. at page 130.

(2) 17 S. C. R. 511.

(3) Cie de Ch. de Fer Atl. au N. O. v. Betournay, 21 R. L. 191.

(4) Central Vermont Railway Company v. Montmagny Insurance Company, Q. R. 2, Q. B. 450.

(5) S. C. Quebec, March, 1895; confirmed in Review (Jetté J. dissenting), 29th February, 1896.

(6) See *Supra*. pp. 85, 187 and 407.

CHAPTER XII.

THE MEASURE OF DAMAGES.

- | | |
|--|--------------------------------|
| 1. <i>In general.</i> | 4. <i>Injuries to persons.</i> |
| 2. <i>Contract of carriage of goods.</i> | 5. <i>Injury to cattle.</i> |
| 3. <i>Breach of contract.</i> | |

In general.

1. The general doctrine as to the measure of damages in cases of contract is summarily comprehended in a few pages of *Pothier*, on Obligations. (1)

This summary statement is referred to in most of the leading cases, and forms, confessedly, the basis of the jurisprudence of England and America upon the subject. Its substance is found in Articles 1073, 1074 *et seq.* of the Quebec Civil Code and Article 1928 of the Louisiana Civil Code of 1826. It is said by *Sedgwick*, on the Measure of Damages, (2) to be "the clearest and most definite rule that can be framed in this perplexing matter." The above articles of the Quebec Code read as follows:—Art. 1073.—"The damages due to the creditor are, in general, the amount of the loss that he has sustained and of the profit of which he has been deprived." Art. 1074.—"The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation; when his breach of it is not accompanied by fraud."

Contract of
carriage of
goods.

2. The amount of damages recoverable from a carrier is such as would naturally result from the breach of the contract, whether as the ordinary consequence of such a breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. (3)

(1) Nos. 159-160 *et seq.*; and see *Behan v. Grand Trunk Ry. Co.*, 11 Q. L. R. 60.

(2) Vol. 1, p. 67.

(3) *Hadley v. Baxendale*, 9 Exch. 341, 23 L. J. Ex. 179; *Horne v. Midland Ry. Co.*, L. R., 8 C. P. 131, 42 L. J. C. P. 59; *Wilson v. Lan. & York Ry. Co.*, 9 C. B. N. S. 632; *Jameson v. Midland Ry. Co.*, 50 L. T. 426; *Redmayne v. G. W. Ry. Co.*, L. R., 1 C. P. 329; in the United States, see *Redfield (Carriers, § 32)*, and *Hutchinson, § 772*.

A carrier's contract should be considered, in respect to damages, without reference to decisions upon other kinds of contracts supposed to be similar. Contracts to build a boat, to repair machinery, and to carry a shipment, differ absolutely from one another on the very important point of implied notice. He who repairs machinery knows, or should know, its probable use; but a carrier may take a shaft across the country without knowing whether it is intended for a steanship or a sugar house.

The point to be examined in each case is really this:—What was the tacit agreement between the parties at the time of the contract, as regards damages claimed? (1)

Where, from the nature and description of the goods, it is evident that they are intended to be resold at a profit, it will be considered that there has been an implied agreement between the parties that if the carrier, by non-delivery, deprive the shippers of these profits, he will be liable in damages for the loss. Such damages would be those which, according to the principle above laid down, either were foreseen or might have been foreseen. (2) But damages for loss of custom arising from such non-delivery are too remote to be held to have been in the contemplation of the parties. (3) This is undoubtedly in accordance with the rule of the English law. Thus, *Mayne*, in his treatise on Damages, says: "But profits and advantages, which are the direct immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. (4)

The British Columbia case of *Hamilton v. Hudson Bay Co.*, and *Irving & Briggs*, (5) would appear to be based upon a mis-

(1) 24 Demolombe, p. 566.

(2) *Behan v. Grand Trunk Ry. Co.*, S. C. 1885, 11 Q. L. R. 60, and English and French authorities there cited.

(3) *Behan v. Grand Trunk Ry. Co.*, S. C. 1885, 11 Q. L. R. 60, and English and French authorities there cited.

(4) At p. 43; and see *The Parana*, Ct. App., 1877, L. R., 2 Prob. Div. 18; *Mason v. Mayor of Brooklyn*, 7 Hill 61. Adopted by *Mayne* in the passage above quoted.

(5) *Parsons*, Vol. 2, B. C. Law Rep., p. 176.

conception of the case of *British Columbia Saw Mill Co. v. Nettleship*, decided in England in 1868. (1) The Court, in the first named case, refused to allow a trader the expected profits on goods shipped by him, which were destroyed, and held that such expected profits were too remote to be included in a verdict, and that, when there has been indefinite loss or damage from delay, beyond the invoice or actual value of the goods lost or mislaid, the reasonable and proper measure of compensation is always held to be attained by giving interest on the actual value, citing *British Columbia Saw Mill Co. v. Nettleship*. (2) This case arose through a breach of contract on the part of a carrier in not delivering a box of machinery for a mill, thus causing a long delay in replacing it. The damages claimed were for the stoppage of the works during the time that the whole machinery remained useless by reason of the absence of the missing box. The Court said that, although the carrier certainly knew that the box contained part of the machinery, yet it was not shewn that he knew it contained a material part, and that without it none of the machinery could be put together. If he had no such knowledge, it could not be said that he intended to become responsible for the consequences which were sought to be imposed upon him. Such damages must be purely speculative damages. (3) And, again, the carrier is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. (4) But the case of *Hamilton v. Hudson's Bay Co. et al.* (5) belongs to the same class of cases as *Behan v. G. T. Ry. Co.*, (6) viz., the shipping of goods by a trader to be sold at a profit, and, in such cases, as a general rule, the measure of the carrier's liability is the market value of the shipment at its destination, computed at the time when it should have been delivered, less transportation charges, with interest. (7)

By the destination is meant the terminus of the road, and not

(1) L. R., 3 C. P. 499.

(2) L. R., 3 C. P. 499.

(3) *Ib.*, at p. 506.

(4) *Ib.*, at p. 505.

(5) Part 2, Vol. 2, B. C. Rep. 176.

(6) *Supra*, p. 411.

(7) See the leading case in the United States, *Gillingham v. Dempsey*, 12 S. & R. 183, Penn. (1824), and authorities there cited; and *Forbes v. Boston*, etc., R. R. Co., 133 Mass. 154.

the final destination which the shipper may intend the freight to reach. (1)

Where the delivery of a box of trees was delayed by the carrier, it was held that the plaintiffs were not entitled to recover for any supposed damage or injury to business, or business reputation, nor for expenses incurred by them in taking the trees round to their customers, since they would have to do that any way. If they could not sell the trees at all by reason of the delay, the loss would be the value of the trees. But if the person who had given orders for the trees took them, after all, at a reduced price, then the difference between the price agreed for originally and that afterwards accepted may form the maximum measure of damages.

(2)

The necessary expenses to which the owner of goods is put in consequence of the carrier's delay to fulfill his contract are recoverable as damages. (3) But, in a Quebec case, it was held that the owner of baggage mislaid by a railway company could not recover for expenses incurred by him in looking after the baggage, the measure of damages being the value of goods lost.

(4)

Contracts of shippers with the consignee or other persons, of which the carrier is not notified at the time of the shipment, are not to be considered in the calculation of damages as against the carrier. (5) But where there is such notice, such damages are allowed. (6)

Depreciation in the market, during delay, is not too remote for consideration, and forms an element in the measure of damages. (7)

(1) *R. R. Co. v. Hale*, 1 S. W. Rep. 625, Tenn. (1886); *Inglelew v. Ry. Co.*, 7 Gray (Mass.) 86; *R. R. Co. v. Reynolds*, 8 Kan. 623 (1871); *R. Co. v. Henry*, 14 Ill. 156 (1852).

(2) *McGill v. G. T. Ry. Co.*, 19 Ont. A. R., at p. 249.

(3) *Black v. Bixendale*, 1 Exch. 410.

(4) *Provencher v. Can. Pac. Ry. Co.*, S. C. 1889, M. L. R. 5 S. C. 9; and see, also, *Deming v. Ry. Co.*, 48 N. H. 455; *Inglelew v. R. R. Co.*, 7 Gray 86 Mass.; *R. R. Co. v. Kennedy*, 41 Miss. 671; *Brigs v. Ry. Co.*, 28 Barb. 515.

(5) *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131; *Thol. v. Henderson*, L. R. 8 Q. B. D. 457.

(6) *Deming v. R. R. Co.*, 48 N. H. 455 (1869), wherein all the English authorities, previous to this case, are cited and discussed; *Harvey v. R. R. Co.*, 124 Mass. 421; *Langdon v. Robertson*, 13 O. R. 497.

(7) *Ward v. R. Co.*, 47 N. Y. 29 (1871); *Cutting v. R. Co.*, 13 Allen 381 (1866); *Sisson v. R. Co.*, 14 Mich. 489 (1866).

Although this point is not free from doubt in England ; yet, in regard to land carriage, it appears to be settled that such damages can be recovered. (1)

But, in cases where the shipment is intended for a particular market day, damages resulting from delay beyond that day, are not recoverable unless the carrier had express notice, or implied notice from a custom so general and well known as to amount thereto, that the shipment was intended for a particular market day. (2)

The loss of profits from an intended special use of the shipment are not recoverable, unless notice as to that use was given at the time of shipment. (3) Such damages include damages for loss of profit on a sub-sale to a purchaser, and a sum for damages recovered by the sub-purchaser for breach of contract which may be the sum actually recovered. (4)

Where plaintiff delivered to common carriers a roll of oil-cloth to be conveyed by them, and, on arrival, it was so damaged that the plaintiff refused to receive it, and brought action for the full value thereof, the Court directed the jury that if they thought the oil-cloth was not seriously damaged, but easily repairable, the plaintiff was bound to receive it, and claim only damages ; but if too seriously injured to fulfill the purpose for which he required it, he might claim its whole value. (5)

Breach of
contract.

3. Under the Quebec Code (6) the damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law—these damages are due without the creditor being obliged to prove

(1) *Wilson v. Lancashire & Yorkshire Ry. Co.*, 9 C. B. N. S. 632 ; *Collard v. S. E. R. Co.*, 7 H. & N. 79, and see *Horne v. Midland Ry. Co.*, *supra*, p. 421.

(2) *R. R. Co. v. Lehman*, 56 Md. 209 ; *Hamilton v. R. R. Co.*, 3 S. E. Rep. 164 ; *North. Car.* (1887).

(3) *Simpson v. L. & N. W. Ry. Co.*, L. R., 1 Q. B. D. 274 ; *Cooper v. Young*, 22 Ga. 269.

(4) *Elbinger Actien Gesellschaft v. Armstrong*, L. R., 9 Q. B. 473 ; *Grebert Borgnis v. Nugent*, 15 Q. B. D. 85 ; *Hamilton v. Magill*, 12 L. R. Ir. 186.

(5) *Dodge v. Windsor & Annapolis Ry. Co.*, 2 Gelder & Oxley 537 ; and see *Hackett v. R. R. Co.*, 35 N. H. 390 ; *Shaw v. R. R. Co.*, 5 Rich. 462 ; *S. Carolina Ry. Co. v. Tyson*, 46 Miss. 729 ; *Briggs v. R. R. Co.*, 28 Barb. 515.

(6) Art. 1077.

any loss. This is also the law of England and the United States, (1) excepting where the obligation has reference to other objects than the mere discharge of a debt. (2) And this distinction obtains under the Quebec law ; for in an action by a railway company against a municipality for refusal to issue debentures, the Supreme Court held that apart from its liability for the amount of the debentures subscribed and interest thereon, the municipality was liable under Arts 1065, 1073, 1840 and 1841 C. C. for damages for breach of the covenant. (3)

And it was also held in this case, that where a party has suffered wrong, and is unable to prove the damages sustained by that wrong, the Court should not dismiss his action, but give him reasonable damages. This doctrine, however, appears to have been modified by the Privy Council in *McDougall v. McGreevy*. (4) In this case the plaintiff transferred shares of railway stock to defendant, the former to have the right to redeem the stock within ten months from date, by paying 50 per cent. of the nominal amount of the share. The plaintiff made a sufficient tender within the delay, but the defendant had disposed of the shares, and refused to receive the amount.

In an action of damages for breach of contract, it was held, that the measure of damages was the sum which the plaintiff could have obtained for the shares beyond the amount which he had to pay to get them back ; and it not being clearly established that he could have sold the shares for more than this amount, or that the defendant had received any greater amount therefor, ~~apart from~~ other and subsequent transactions, the action was dismissed.

Where the defendant was obliged to return the plaintiff certain railway bonds, but was unable to do so owing to his having sold them, it was held that he should be condemned to pay the actual value thereof at the time the bonds were acquired by him, and not their *par* or nominal value. (5)

(1) *Fletcher v. Tayleur*, 17 C. B. 21 ; *London v. Taxing District*, 104 U. S. 771.

(2) *Marzetti v. Williams*, 1 B. & Ad. 415 ; *Prehn v. Royal Bank of Liverpool*, L. R., 5 Ex. 92.

(3) *Corporation of Ottawa v. Montreal, Ottawa & Western Ry. Co.*, 14 S. C. R. 193.

(4) P. C. 1889, 12 L. N. 379.

(5) *Senecal v. Hatton*, P. C. 1886. 10 L. N. 50.

For refusal by a railway company to transfer shares during several months, the true measure of damage is the difference between the price of the stock at the time of such refusal and the price at the time of the subsequent registration of the transfer. (1)

Where a railway company, in breach of a contract entered into by them to run trains from the eastern part of a city to the western part, ceased to run such trains, it was held, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation, which could be traced to or reasonably connected with the company's default, formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly, the enquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued. The personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station, or the actual depreciation in the value of the land individually owned in that neighborhood could not be reckoned as constituents *per se* of the damages suffered by the corporation. If the railway company admitted that they were never again going to run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing a lump sum, or by directing a yearly payment. (2)

Injuries to
persons.

4. The damage which can be recovered in respect of death occasioned by a wrongful act, neglect or default is restricted to the actual pecuniary loss sustained by the plaintiff. (3) But in calculating the effect of an insurance on deceased's life in favor of his widow, the amount of such policy is not to be deducted from the amount of damages previously assessed, irrespective of such consideration. She is benefited only by the accelerated receipt

(1) *G. T. Ry. Co. v. Webster*, 6 L. C. J. 179.

(2) *Corporation of the City of St. Thomas v. Credit Valley Ry. Co.*, 15 O. R. 673.

(3) *G. T. Ry. Co. v. Jennings*, P. C. 1888, 13 App. Cas. 800.

of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased. (1)

In England it has been clearly laid down that the feelings of the bereaved consort, child or parent, cannot be taken into consideration in the estimation of damages. Under the Quebec law the contrary doctrine prevailed until overruled by the Supreme Court in *Canadian Pacific Ry. Co. v. Robinson*, (2) and *City of Montreal v. Labelle*, (3) thus rendering the law of Ontario and Quebec uniform on this point. (4)

Although, on the death of a wife caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. (5)

If the amount awarded in the Court of first instance is not such as to shock the sense of justice and to make it apparent that there was an error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required), an appellate Court will not interfere with the discretion such judge has exercised in determining the amount of damages. (6)

Where the jury granted \$2,000 damages for a supposed broken arm, and the evidence as to the injury being very loose, no medical witnesses having been called, the Court granted a new trial on payment of costs. (7)

(1) *Ib. & G. T. Ry. Co. v. Beckett*, Supreme Court 1886, 16 S. C. R. 713; *Bradburn v. G. W. Ry. Co.*, L. R., 10 Ex. 1.

(2) 14 S. C. R. 105.

(3) 14 S. C. R. 741.

(4) As to pain and suffering as an element in assessing damage in Quebec, see *Auclair v. Bastien*, M. L. R., 4 S. C. 74; and in England, *Phillips v. London & S. W. Ry. Co.*, L. R., 5 C. P. D. 280.

(5) *St. Lawrence & Ottawa Ry. Co. v. Lott*, Supreme Court 1883, 11 S. C. R. 422.

(6) *Levi v. Reed*, Supreme Court, 6 S. C. R. 482; *Gingras v. Desilets*, Supreme Court, 11th Feb., 1881, Cassel's Dig. 213; *Blanchard v. Windsor & Annapolis Ry. Co.*, 1 Russell & Chesley (Nova Scotia) 8; *Lambkin v. South Eastern Ry. Co.*, P. C. 1880, 5 App. Cas. 352.

(7) *Watson v. The Northern Ry. Co.*, 24 U. C. Q. B. 98.

Where a verdict of £50 was given against a railway company for putting the plaintiff off a train, though the inconvenience occasioned to him was trifling, and the conductor acted *bona fide* under an impression that the plaintiff had not paid his fare, and without harshness or violence, a new trial was granted for excessive damages. (1) Where there are two concurring verdicts, the Court will very rarely grant a new trial, though there are cases, such as *Gibson v. Muskett*, (2) where the question being substantially a point of law, a third trial has been granted. However, in an early Ontario case, (3) it was held that the Court will grant repeated new trials where verdicts are rendered contrary to law and evidence, especially in cases affecting continuous rights. But in a later Ontario case (4) it was held that although the damages awarded (\$300 for being wrongfully put off a train) were excessive, yet, it being the second verdict obtained by the plaintiff, the Court would not, on that ground, disturb the verdict. In another recent Ontario case, (5) the jury assessed plaintiff's damages for wrongful removal from the train at \$1,000, which was affirmed by the Divisional Court; but in appeal this amount was reduced to \$500, as being unwarrantably large.

Injury to
cattle.

5. The damages contemplated by the sections of the Railway Acts relating to injury to cattle on the track are actual damages, and the expense and trouble a proprietor of cattle incurs in herding his cattle before the accident to prevent their escaping on to the railway lines, on account of absence of fences, is not a damage that can be recovered from the railway company. (6)

(1) *Huntsman v. Great Western Ry. Co.*, 20 U. C. Q. B. 24.

(2) 4 M. & Gr. 160.

(3) *Kirby v. Lewis*, 1 U. C. Q. L. 285 (1843).

(4) *Curtis v. G. T. Ry. Co.*, 12 U. C. C. P. 89 (1862).

(5) *Dancey v. G. T. Ry. Co.*, 1892, 19 Ont. A. R. 664; as to the measure of damages in cases of passengers being put off the train or being delayed on the journey; See *Supra*, pp. 289, 342.

(6) *Fouchon v. O. & Q. Ry. Co.*, 11 L. N. 74.

APPENDIX
CONTAINING
DOMINION RAILWAY ACT
(As amended to date),

AND CONCORDANCE THEREWITH OF PROVINCIAL ACTS
(As amended.)

Note.—When a figure comes after matter between brackets : thus (.....) (1) the reference to such figure relates to all the matter contained between the brackets so numbered. When a figure occurs between words, such figure relates to matter to be interpolated.

DOMINION RAILWAY ACT.

51 VICTORIA.

CHAP. 29.

AN ACT RESPECTING RAILWAYS.

(Assented to 22nd May, 1888.)

HER Majesty, by and with the advice and consent of the Preamble.
Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

1. This Act may be cited as "*The Railway Act.*" Short title.

INTERPRETATION.

2. In this Act and in the special Act incorporating any railway company to which this Act or any part thereof applies, unless the context otherwise requires,—

(a) The expression "company" means a railway company, "Company," and includes any person having authority to construct or operate a railway;

R. S. O., ch. 170, sec. 3 (10). "The Company" means the company or party authorized by the special Act to construct the railway. R. S. Q., Art. 5129 (10); R. S. M., ch. 130, sec. 3 (4); R. S. N. S., ch. 53, sec. 5 (15). N.B., 1891, ch. 18, sec. 3 (2). Same as Ontario.

"County." (b) The expression "county" includes any county, union of counties, riding (or like division of a county in any Province, or, in the Province of Quebec, any division thereof into separate municipalities) (1);

R. S. O., ch. 170, sec. 3 (5). First ten words of above and (1) "District and County Court Judge shall include a judge of a District Court."

R. S. Q., Art. 5129 (5). "Shall include any county, any union of counties, or any division thereof into separate municipalities."

N. B., 1891, ch. 18, sec. 3 (4). "County or District" shall mean County Court Districts. Sec. 3 (3). "County Court Judge" shall include a judge of the Supreme Court.

R. S. N. S., ch. 53, sec. 5 (10). "The word 'County' shall include county, or any division thereof into separate municipalities."

"Court." (c) The expression "court" means a superior court of the Province or district;

"Department." (d) The expression "department" means the Department of Railways and Canals;

"Deputy." (e) The expression "deputy" means the Deputy of the Minister of Railways and Canals;

"Goods." (f) The expression "goods" includes things of every kind that may be conveyed upon the railway, or upon steam vessels or other vessels connected with the railway;

R. S. O., ch. 170, sec. 3 (4).

R. S. M., ch. 130, sec. 3 (d).

R. S. Q., Art. 5129 (4).

N. B., 1891, ch. 18, sec. 3 (5).

R. S. N. S., ch. 53, sec. 5 (9).

"Highway." (g) The expression "highway" includes any public road, street, lane, or other public way or communication;

R. S. O., ch. 170, sec. 3 (6).

R. S. Q., Art. 5129 (6).

R. S. M., ch. 130, sec. 3 (e).

N. B., 1891, ch. 18, sec. 3 (6). Also squares.

R. S. N. S., ch. 53, sec. 5 (11).

"Inspecting Engineer." (h) The expression "inspecting engineer" means an engineer who is directed by the Railway Committee or by the Minister to examine any railway or works, and includes two or more engineers when two or more are so directed;

"Judge." (i) The expression "judge" means a judge of a superior court.

R. S. M., ch. 130, sec. 2 (e). The expressions "judge in chambers" and "judge" respectively mean a judge of the Court of Queen's Bench sitting in Chambers. See also notes to (h) *supra*.

(j) The expression "justice" means a justice of the peace "Justice." acting for the district, county, riding, division, city or place where the matter requiring the cognizance of a justice arises, and who is not interested in the matter, (1) (and when any matter is authorized or required to be done by two justices, the expression "two justices" shall be understood to mean two justices assembled and acting together.) (2) Two justices."

R. S. O., ch. 170, sec. 3 (8).—(1) "and where the matter arises in respect of lands being the property of one and the same party, situate not wholly in any one district, county, riding, division, city or place. The word "justice" shall mean a justice acting for the district, county, riding, division, city or place where any part of such lands are situate, and who is not interested in such matters." Thus also R. S. M., ch. 130, sec. 3 (j), and R. S. Q., Art. 5129 (8). N. B., 1891, ch. 18, sec. 3 (7).

(2) Provision as to two justices, R. S. Q. only.

R. S. N. S., ch. 53, sec. 5 (13). Same as Quebec.

(k) The expression "lands" means the lands, the acquiring, "Lands." taking or using of which is incident to the exercise of the powers given by this or the special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure;

R. S. O., ch. 170, sec. 3 (1). "Lands shall include all real estate, messuages, lands, tenements and hereditaments of any tenure." Also R. S. M., ch. 130, sec. 3 (a); R. S. Q., Art. 5129 (1). N. B., 1891, ch. 18, sec. 3 (8); R. S. N. S., ch. 53, sec. 5 (6).

(l) The expression "lease" includes an agreement for a "Lease." lease;

R. S. O., ch. 170, sec. 3 (2).

R. S. M., ch. 130, sec. 3 (b).

R. S. Q., Art. 5129 (2).

N. B., 1891, ch. 18, sec. 3 (9).

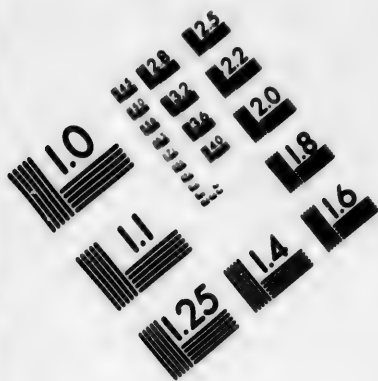
R. S. N. S., ch. 53, sec. 5 (7).

(m) The expression "map or plan" means a ground plan "Map or plan." of the lands and property taken or intended to be taken.

(n) The expression "Minister" means the Minister of Rail- "Minister." ways and Canals;

(o) A railway shall be deemed to come "near" to another "Near." when some part of the one is within one mile of some part of the other;

(p) The expression "owner," when, under the provisions of "Owner." this Act or the special Act, any notice is required to be given to the owner of any lands, or when any act is authorized or required to be done with the consent of the owner, means any (1)



person who, under the provisions of this Act or the special Act, or any Act incorporated therewith, would be enabled to sell and convey lands to the company; (2)

R. S. O., ch. 170, sec. 3 (9).—(1) "Corporation or". R. S. M., ch. 130, sec. 3 (4); R. S. Q., Art. 5129 (9); R. S. N. S., ch. 53, sec. 5 (14). N. B., 1891, ch. 18, sec. 3 (10). Same as Ontario.

(2) N. B. Additional, "And shall also (subject to the payment to the Crown of any unpaid purchase money) include a recognized applicant for Crown Lands."

"Railway." (q) (*As amended by 55-56 Vic., ch. 27, sec. 1*). The expression "railway" means any railway which the company has authority to construct or operate, and includes all stations, depots, wharves, rolling stock, equipment, property, and works connected therewith, and also any railway bridge or other structure which any company is authorized to construct under a special Act;

R. S. O., ch. 170, sec. 3 (11). "The Railway" shall mean the railway and works by the special Act authorized to be constructed (1); also R. S. M., ch. 130, sec. 3 (1); R. S. N. S., ch. 53, sec. 5 (16).

N. B., 1891, ch. 18, sec. 3 (11), same as Dominion Act.

R. S. Q., Art. 5129 (11), same as Ontario; additional (1) "or executed."

"Railway Committee." (r) The expression "the Railway Committee" means the Railway Committee of the Privy Council;

"Sheriff." (s) The expression "sheriff" means the sheriff of the district, county, riding, division, city or place within which are situated any lands in relation to which any matter is required to be done by a sheriff, and includes an under-sheriff or other lawful deputy of the sheriff;

N. B. 1891, ch. 18, sec. 3 (14). "Sheriff" shall include (Deputy Sheriff), (1) or other legal competent deputy; and where any matter in relation to any lands is required to be done by any Sheriff or Clerk of the Peace, the expression "Sheriff" or the expression "Clerk of the Peace" shall in such cases be construed to mean the Sheriff or Clerk of the Peace of the County (2) where such lands are situate; and if the lands in question (3) are not situate wholly in one County (4), the same expression shall be construed to mean the Sheriff or Clerk of the Peace of any County where any parts of such lands are situate."

R. S. O., ch. 170, sec. 3 (7), same as N.B., excepting (1) "under Sheriff," (2) "district, county, riding, division or place," (3) "being the property of one and the same party," (4) "district, county, riding, division or place."

R. S. Q., Art. 5129 (7), same as N.B., excepting (1) "under Sheriff," (3) "being the property of one and the same party."

R. S. N. S., ch. 53, sec. 5 (12). Same as Ontario.

(f) The expression "Special Act" means any Act under "Special Act." which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes all such Acts;

R. S. O., ch. 170, sec. 2 (1). "The special Act" shall be construed to mean any act authorizing the construction of a railway, and with which this Act is incorporated. (1)

R. S. M., ch. 130, sec. 2 (a). Same as Ontario; additional (1) "and includes The Railway Companies' Incorporation Act."

R. S. Q., Art. 5128. The expression "the Special Act or charter" shall be construed to mean any Act, statute, or law authorizing the construction of a railway with which this section of the Quebec Consol. Ry. Act 1880 is incorporated.

N.B., 1891, ch. 18, sec. 2 (1). R. S. N. S., ch. 53, sec. 5 (1). Same as Ontario.

(g) The expression "toll" includes any rate or charge "Toll." made for the conveyance of any passenger, goods, or carriage, or for the collection, loading, unloading, cording or delivery of goods, or for warehousing or wharfage, or other services incidental to the business of a carrier;

R. S. O., ch. 170, sec. 3 (3). "Toll" shall include any rate or charge or other payment payable under this Act or the Special Act, for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway. N. B., 1891, ch. 18, sec. 3 (15); R. S. Q., Art. 5129 (3); R. S. N. S., ch. 53, sec. 5 (8); R. S. M., ch. 130, sec. 3 (c). Same as Ontario.

(h) The expression "traffic" includes not only passengers "Traffic." and their baggage, goods, animals and things conveyed by railway, but also cars, trucks and vehicles of any description adapted for running over any railway;

(i) The expression "the undertaking" means the railways "The undertaking." and works, of whatsoever description, (1) which the company has authority to construct or operate;

R. S. O., ch. 170, sec. 2 (4).--(1) "by the special Act authorized to be executed." R. S. M., ch. 130, sec. 2 (d); R. S. Q., Art. 5128 (4); R. S. N. S., ch. 53, sec. 5 (4). N. B., 1891, ch. 18, sec. 2 (4). Same as Ontario.

(j) The expression "working expenditure" means and includes "Working expenditure." all expenses of maintenance of the railway, and of the stations, buildings, works and conveniences belonging thereto, and of the rolling and other stock and movable plant used in the working thereof, and also all such tolls, rents or annual sums as are paid in respect of property leased to or held by the company,

apart from the rent of any leased line, or in respect of the hire of engines, carriages or waggons let to the company; also, all rent charges or interest on the purchase money of lands belonging to the company, purchased but not paid for, or not fully paid for; and also all expenses of or incidental to working the railway, and the traffic thereon, including stores and consumable articles; also, rates, taxes, insurance and compensation for accidents or losses; also, all salaries and wages of persons employed in and about the working of the railway and traffic; and all office and management expenses, including directors' fees, agency, legal and other like expenses; and generally all such charges, if any, not above otherwise specified, as in all cases of English railway companies are usually carried to the debit of revenue, as distinguished from capital account;

When lands are not situate wholly in one district.

(y) When any matter arises in respect of any lands which are the property of one and the same person, and which are not situate wholly in any one district, county, riding, division, city or place, the expressions "clerk of the peace," "justice" and "sheriff" respectively, mean any clerk of the peace, justice or sheriff for any district, county, riding, division, city or place within which any portion of such lands is situate; and the expressions "clerk of the peace" and "sheriff" respectively include the like persons as in other cases.

See *supra* (c) and (j).

APPLICATION OF THE ACT.

Application of Act.

3. This Act, subject to any express provisions of the special Act, and to the exception hereinafter mentioned, applies to all persons, companies and railways within the legislative authority of the Parliament of Canada, except Government railways.

R. S. O., ch. 170, sec. 4. "Where not otherwise expressed, this (and the following sections to section 44 inclusive) (1) shall apply to every railway which is subject to the Legislative authority of the Legislature of this Province (and has been authorized to be constructed by any special Act of the late Province of Canada or of this Province, passed since the 30th day of August, 1851), (2) or is authorized to be constructed by any special Act passed after this Act takes effect; (3) and this Act shall be incorporated with every such special Act; and all the clauses and provisions of this Act, unless they are expressly varied or excepted by such special Act, shall apply to the undertaking authorized thereby, so far as applicable to the undertaking, and shall, as well as the clauses and provisions of every other Act incorporated with such special Act, form part of such special Act, and be construed together therewith as forming one Act."

R. S. M., ch. 135, sec. 4, same as Ontario, excepting (1) "Act," (2) omitted, (3) additional, "or since the 25th May, 1881."

R. S. Q., Art. 5125, "Articles 5128 to 5181, both inclusive, apply to every railway constructed or to be hereafter constructed, and shall, in so far as they are applicable to such undertaking, and unless they are expressly varied or excepted by the charter or special Act, be incorporated with the charter or special Act, form part thereof, and be construed accordingly."

N. B., 1891, ch. 18, sec. 4 (as amended by 56 Vic., ch. 9).

"Where not otherwise expressed, this and the following sections, to section 35 inclusive, shall apply to every railway which is subject to the legislative authority of the Legislature of this Province, and is authorized to be constructed by any special Act passed during this present session or after this Act takes effect, and shall also apply to every railway company which shall, after the passage of this Act, elect to become subject to this section by serving a written notice of such election under its seal upon the Provincial Secretary, whose duty it shall be, at the expense of the company, to publish a notice of such election in the Royal Gazette, for at least four consecutive issues immediately subsequent to such election, and the said sections of this Act, from 4 to 35 inclusive, shall be, deemed to be incorporated with every such special Act, or with the Act incorporating said company so making such election, and all the provisions of such sections, unless they are expressly varied or excepted by such special Act, shall apply to the undertaking authorized thereby, so far as applicable to the undertaking, and shall, as well as the clauses and provisions of every other Act incorporated with such special Act, form a part of such special Act, or incorporating Act, and be construed together therewith as forming one Act."

R. S. N. S., ch. 53, sec. 1. "The provisions of this chapter from section 5 to section 33 both inclusive, being part 1st of this chapter, shall apply to every railway constructed and in operation, or hereafter to be constructed, under authority of any Act passed by the Legislature of Nova Scotia, and shall, so far as they are applicable to the undertaking be incorporated with the Special Act, form part thereof, and be construed as forming one act, unless they are inconsistent with or are expressly varied, or excepted by the Special Act or other Act of the Legislature of Nova Scotia."

4. In addition, all the provisions of this Act relating to any subject or matter within the legislative authority of the Parliament of Canada, and for greater certainty, but not so as to restrict the generality of the foregoing terms, all provisions relating to railway crossings and junctions, offences and penalties and statistics apply to all persons, companies and railways, whether otherwise within the legislative authority of Parliament or not.

5. The provisions of this Act, from section thirty-two to section eighty-nine, both inclusive, do not apply to every company and railway within the legislative authority of the Parliament of Canada, but apply to—

(a) Every company whose authority to construct or operate any railway is derived from the Parliament of Canada, and to

And of certain provisions thereof.
Application of sections 32 to 89.

every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada ;

(b) Every company and railway to which such provisions are made applicable, as hereinafter provided ;

To form part
of special Act.

2. Such provisions shall, in so far as they are applicable to the undertaking, and unless they are expressly varied or excepted therefrom by the special Act, be incorporated with the special Act, form part thereof, and be construed therewith as forming one Act ;

Exception of
certain provi-
sions.

3. (Any of such provisions) (1) may be excepted from incorporation with the special Act, by enacting, in such special Act, that the sections of this Act proposed to be excepted, referring to them by the numbers which they bear respectively, shall not be incorporated with such special Act, which shall thereupon be construed accordingly.

R. S. Q., Art. 5126, same as sec. 5 (3) Dom. Act, excepting (1) "Articles 5128 to 5181."

R. S. Q., Art. 5127. "Articles 5182 to 5221, both inclusive, apply to all railways in course of construction by the Government of the Province of Quebec, and the property of the Province of Quebec, in so far as they are not inconsistent with any special Act respecting them, to all railways, which have been or which may be constructed under the authority of any charter granted by the Legislature of the Government of this Province, and to all companies incorporated for their construction and working ; subject always to any provisions hereinafter made as to the application of any article or provision of this section to any railway, or as to the time from which it is to be held as so applying."

N. B., 1891, ch. 18, sec. 5, repealed by 56 Vic., ch. 9. See under sec. 3 Dominion Act.

R. S. M., ch. 130, sec. 5. "Every special Railway Act shall be a public Act, and for the purpose of incorporating this Act or any of its provisions with a special Act, it shall be sufficient in such Act to enact, that the clauses of this Act, with respect to the matter so proposed to be incorporated, referring to the same in the word or words at the head of and introductory to the enactment with respect to such matter, shall be incorporated with the special Act, and thereupon all the clauses and provisions of this Act, with respect to the matter so incorporated, shall, save in so far as they are expressly varied or excepted by the special Act, form part thereof, and the special Act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which the special Act relates."

R. S. O., ch. 170, sec. 5, same as Manitoba.

R. S. O., ch. 170, sec. 45. "Unless otherwise provided, the following sections (45 to 111) and sub-section 4 of sec. 41 shall apply to every railway subject to the legislative authority of the Legislature of this Province, made or to be made in this Province." R. S. N. S., ch. 53, sec. 4 (part second).

R. S. N. S., ch. 53, sec. 3, same as sec. 5 (3), Dom. Act, excepting (1) "Sections forming part 1st of this chapter."

6. If in any special Act it is provided that any provisions of any general Railway Act in force at the time of the passing of the special Act is excepted from incorporation therewith, or if the application of any such provision is extended, limited or qualified, the corresponding provision of this Act shall be excepted, extended, limited or qualified in like manner.

SECTIONS WHICH MAY BE MADE APPLICABLE TO ANY RAILWAY
WITHIN THE LEGISLATIVE AUTHORITY OF PARLIAMENT.

7. Any company within the legislative authority of the Parliament of Canada, to which the provisions of sections thirty-two to eighty-nine both inclusive of this Act are not, or are not clearly and without question, applicable, may apply to the Governor in Council for an order to make the same with or without exceptions or qualifications applicable to such company; and the Governor in Council, upon proof that notice of such application has been inserted for four weeks in the *Canada Gazette*, may order and declare that the provisions of sections thirty-two to eighty-nine both inclusive of this Act, with such exceptions and qualifications as to the Governor in Council appear just, shall thereafter apply to such company and its railway; and such order shall be published in the *Canada Gazette*, and a copy thereof laid before Parliament within fourteen days after the next meeting thereof.

THE RAILWAY COMMITTEE.

8. The Railway Committee of the Privy Council shall consist of the Minister of Railways and Canals, who shall be chairman thereof, of the Minister of Justice, and of two or more of the other members of the Queen's Privy Council for Canada, to be from time to time appointed by the Governor in Council, three of whom shall form a quorum; and such committee shall have the powers and perform the duties assigned to it by this Act.

R. S. Q., Art. 5182. "The Lieutenant-Governor may, from time to time, appoint such members of the Executive Council, to the number of four at least, as he may see fit, to constitute the Railway Committee of the Executive Council, and such committee shall have the powers and perform the duties assigned to it by this section."

R. S. M., ch. 130, sec. 30. "The Railway Committee shall consist of the Railway Commissioner, the Minister of Public Works, and such other member of the Executive Council as may from time to time be appointed by the Lieutenant-Governor in Council, and two of such Committee shall constitute a quorum." (See also The Railway Commissioner's Act, R. S. M., ch. 131.)

Secretary. **9.** The deputy of the Minister of Railways and Canals, or some other fit person appointed by the Committee, shall be secretary of the Committee.

J. R. S. Q., Art. 5183. "The Railway Committee shall appoint one of its members to be chairman, and the Assistant Commissioner of Public Works, or some other fit person appointed by the Committee, shall be the secretary of the Committee."

Powers. **10.** The Railway Committee may :—

Rate of speed in cities, etc. **(a)** Regulate and limit the rate of speed at which railway trains and locomotives may be run in any city, town or village, or in any class of cities, towns or villages described in any regulation, limiting, if the said Railway Committee thinks fit, the rate of speed within certain described portions of any city, town or village, and allowing another rate of speed in other portions thereof,—which rate of speed shall not in any case exceed six miles an hour, unless the track is properly fenced ;

Steam whistle. **(b)** Make regulations with respect to the use of the steam whistle within any city, town or village, or any portion thereof ;

Safety of employees, etc. **(c)** *As amended by 57-58, Vic. ch. 53 ;* Make regulations with respect to the method of passing from one car to another, either inside or overhead, and for the safety of railway employees while passing from one car to another, and for the coupling of cars ; and shelter of motormen and other employees operating electric and other railway cars.

Penalties. **(d)** Impose penalties, not exceeding twenty dollars for each offence, on every person who offends against any regulation made under this section,—which penalties shall be recoverable upon summary conviction ;

Other liability not affected. **2.** The imposition of any such penalties shall not lessen or affect any other liability which any person may have incurred.

What matters Railway Committee may hear and determine. **11.** The Railway Committee shall have power to enquire into, hear and determine any application, complaint or dispute respecting :—

Right of way. **(a)** Any right of way over or through lands owned or occupied by any company ;

Change of line. **(b)** Changes in location for lessening a curve, reducing a gradient, or benefiting the railway, or for other purposes of public advantage ;

Branch lines. **(c)** The construction of branch lines exceeding one-quarter of a mile in length, but not exceeding six miles ;

- (d) The crossing of the tracks of one company by the tracks of another company ; Crossing tracks.
- (e) The alignment, arrangement, disposition or location of tracks ; Location of track.
- (f) The use by one company of the tracks, stations or station grounds of another company ; Use of tracks.
- (g) The construction of works in navigable waters ; Works in waters.
- (h) The construction of railways upon, along and across highways ; Highways.
- (i) The proportion in which the cost of fencing the approaches to crossings on railways constructed or under construction on the nineteenth of April, one thousand eight hundred and eighty-four, shall be borne by the company and the municipality or person interested ; Cost of fencing.
- (j) The compensation to be made to any person or company in respect of any work or measure directed to be made or taken, or the cost thereof, or the proportion of such cost, to be borne by any person or company ; Compensation for work ordered.
- (k) Tolls and rates for the transportation of passengers and freight ; Tolls.
- (l) The adjustment of such tolls and rates between companies ; Adjustment of tolls.
- (m) Running powers or haulage ; Running powers.
- (n) Traffic arrangements ; Traffic.
- (o) Transhipment or interchange of freight ; Transhipment.
- (p) Unjust preferences, discrimination or extortion ; Preferences.
- (q) Any highway or street, ditch or sewer, water, gas or other pipes or mains over or through lands owned or occupied by the company ; or— Streets, sewers, etc.
- (r) Any matter, act or thing, which by this or the special Act is sanctioned, required to be done, or prohibited. General matters.

12. The Railway Committee or the Minister may appoint or direct any person to make an enquiry and report upon any application, complaint or dispute pending before such committee, or any matter or thing connected therewith or incident thereto. Report may be ordered to be made.

Powers as to inquiry into accident or casualty.

13. The Railway Committee, the Minister, inspecting engineer, commissioner for enquiry into any accident or casualty, or person appointed to make any enquiry or report, may—

Entry.

(a) Enter into and inspect any place or building being the property or under the control of any company, the entry or inspection of which appears to it or him requisite ;

Inspection.

(b) Inspect any works, engines, cars, carriages or property of the company ;

Witnesses.

(c) Require the attendance of all such persons as it or he thinks fit to call before it or him, and examine, and require answers or returns to such enquiries as it or he thinks fit to make ;

Books, papers, etc

(d) Require the production of all books, papers, plans, specifications, drawings and documents relating to the matter before it or him ;

Oaths.

(e) Administer oaths, affirmations or declarations.

R. S. O., ch. 170, sec. 51. "The Lieutenant Governor in Council may appoint and authorize any proper person or persons, not exceeding three in number, whose duty it shall be from time to time to inspect all railways constructed or in course of construction, and every person so authorized may, at all reasonable times, upon producing his authority if required, enter upon and examine the railway and the stations, fences or gates, road crossings, cattle guards, works and buildings, and the engines, cars and carriages belonging thereto."

N. B., 1891, ch. 18, sec. 38, same as Ontario.

➤ R. S. Q., Art. 5192. "Any engineer appointed as aforesaid to inspect any railway or works may, at all reasonable times, upon producing his authority, if required, enter upon and examine the said railway and the stations, fences or gates, road crossings, cattle-guards, works and buildings, and the engines, cars and carriages belonging thereto."

Drains, water and other pipes on property of company.

14. Whenever, after due notice of application therefor, the Railway Committee decides that it is necessary in the interest of any municipality, that means of drainage should be provided, or lines of water pipes or other pipes should be laid, or streets made through, along, across or under any works or lands of the company, it may, after hearing the parties, direct how and on what terms such drainage may be effected, or water pipes or other pipes laid or streets made ; and thereupon such municipality may construct the works necessary to carry out such direction, but only under the supervision of such official as the Railway Committee appoints,—or at its option the Company may construct such works under the like supervision ; and the cost of

constructing such works, the cost of supervision, and the continued maintenance of the same shall be paid by such municipality, unless the Railway Committee direct that the company bear some proportion thereof,—in which case the company shall bear such proportion as the Railway Committee decides. Expense, by whom borne.

15. The Railway Committee, the Minister and every such engineer, commissioner or person, shall have the same power to enforce the attendance of witnesses, and to compel them to give evidence and produce the books, papers or things which they are required to produce, as is vested in any court in civil cases. Compelling attendance of witnesses, &c.

16. Every person summoned to attend before the Railway Committee, or the Minister, or before any such engineer, commissioner, or person, shall receive the same fees and allowances for so doing as if summoned to attend before a court of civil jurisdiction in the Province in which he is required to appear. Payment of witnesses.

17. Any decision or order made by the Railway Committee under this Act may be made an order of the Exchequer Court of Canada, or of any superior court of any Province of Canada, and shall be enforced in like manner as any rule or order of such court. Decision may be made order of court.

18. The Railway Committee may review and rescind, or vary any decision or order previously made by it. Review of decision.

19. The Railway Committee may, if it thinks fit, at the instance of any party to the proceedings before it, and upon such security being given as it directs, state a case in writing for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Committee is a question of law. Case may be stated for opinion.

20. The Supreme Court of Canada shall hear and determine the question or questions of law arising thereon, and remit the matter to the Railway Committee with the opinion of the court thereon. Opinion to be delivered.

21. Subject to the provisions of section eighteen, every decision and order of the Railway Committee shall be final: Provided always, that either party may petition the Governor in Council, and the Governor in Council may, in his discretion, rescind, change or vary such order as he deems just and proper. Decision final. Appeal to Governor in Council.

Costs.

22. The costs of and incidental to any proceeding before the Railway Committee shall be in the discretion of the Committee.

Certain documents to be evidence.

23. Every document purporting to be signed by the chairman and secretary of the Railway Committee, or by either of them, or by the Minister, shall be received in evidence without proof of any such signature, and until the contrary is proved shall be deemed to have been so signed and to have been duly executed or issued by such committee or by the Minister, as the case may be.

Promulgation of order of committee.

24. Every decision and order of the Railway Committee shall be considered as made known to the company by a notice thereof (signed by the chairman and the secretary of the committee, or by either of them), (1) and delivered to the president, vice-president, managing director, secretary or superintendent of the company, or at the office of the company (and every order of the Minister or of the inspecting engineer shall be deemed to be made known to the company by a notice thereof, signed respectively by the Minister or the engineer, and delivered as above mentioned). (2)

And of minister or inspecting engineer.

R. S. O., ch. 170, sec. 70—(2) "All orders of the (Commissioners) (a) shall be considered as made known to the railway company by a notice thereof signed by him, and delivered to the president, vice-president, managing-director, secretary or superintendent of the company (b)."

N. B., 1891, ch. 18, sec. 57. Same as Ontario, excepting (a) "Chief Commissioner of Public Works," (b) "or at the office of the Company."

R. S. Q., Art. 5201. Same as Dominion, excepting (1) "signed by the chairman and countersigned by the secretary of the Committee." Also omitting the word "Minister" before inspecting engineer in the latter part.

R. S. N. S., ch. 53, sec. 53, same as Dominion, excepting (1) "signed by the Commissioner of Public Works." And substituting "Governor in Council" for "Railway Committee", also omitting "Minister."

Publication by the company.

25. Every company shall, as soon as possible after the receipt of any order or notice of the (Railway Committee or the Minister or the inspecting engineer), (1) give cognizance thereof to each of its officers and servants (by delivering a copy to him, or by posting up a copy thereof in some place where his work or his duties, or some of them, are to be performed). (2)

R. S. O., ch. 170, sec. 59.—(1) "Commissioner of Public Works," (2) "in one or more of the ways mentioned in section 89 of this Act." Sec. 89 reads as follows: "The notice of the by-law or of any order or notice of the Commissioner of Public Works may be proved by proving the delivery of a

copy thereof to the officer, servant or person, or that he signed a copy, or that a copy thereof was posted in some place where his work or his duties, or some of them, were to be performed."

N. B., 1891, ch. 18, sec. 56. Same as Ontario. Referring to sec. 69 of the Act, same as sec. 89 of Ontario Act.

R. S. Q., Art. 5200. Same as Ontario. Referring to Art. 5142 of the Act, same as sec. 89 of Ontario Act.

INSPECTING ENGINEERS.

26. Every company, and the officers and directors thereof, shall afford to any inspecting engineer such information (1) as is within their knowledge and power in all matters inquired into by him, and shall submit to such inspecting engineer all plans, specifications, drawings and documents relating to the construction, (3) repair or state of repair of the railway or any portion thereof. (2)

R. S. O., ch. 170, sec. 61—(2) "Whether a bridge culvert or other part."

R. S. Q., Art. 5193. Same as Ontario.

N. B., 1891, sec. 48. Same as Ontario, excepting (1), "and full and true explanations," (3) "and reconstruction."

R. S. N. S., ch. 53, sec. 43 (1). Same as Ontario.

27. Every such inspecting engineer shall have the right, while engaged in the business of such inspection, to travel without charge on any of the ordinary trains running on the railway, and to use the telegraph wires and machinery in the offices of or under the control of any such company.

R. S. O., ch. 170, sec. 62. "The inspector shall have the right to use the telegraph wires and machinery in the offices of or under the control of such railway company, for the purpose of communicating with any of the officers of the company, or transmitting any order of such inspector relating to the railway."

R. S. Q., Art. 5193 (2). Same as Dominion Act.

N. B., 1891, ch. 18, sec. 49. Same as Ontario.

R. S. N. S., ch. 53, sec. 43 (2). Same as Dominion.

28. The operators or officers employed in the telegraph offices of or under the control of the company shall, without unnecessary delay, obey all orders of any such inspecting engineer for transmitting messages; and every such operator or officer who neglects or refuses so to do shall, for every such offence, be liable (on summary conviction) (1) to a penalty of forty dollars.

R. S. O., ch. 170, sec. 63. Same as Dominion Act, excepting (1) omitting "on summary conviction."

THE RAILWAY LAW OF CANADA.

R. S. Q., Art. 5193 (3). Same as Ontario.
N. B., 1891, ch. 18, sec. 50. Same as Ontario.
R. S. N. S., ch. 53, sec. 43 (3). Same as Ontario.

Proof of his
authority.

29. The production of instructions in writing, signed by the chairman of the Railway Committee and the secretary thereof, or by either of them, or by the Minister, shall be sufficient evidence of the authority of such inspecting engineer.

R. S. O., ch. 170, sec. 64. "The authority of such inspector shall be sufficiently evidenced by a paper in writing nominating him an inspector of railways, or of any railway in particular, signed by the Commissioner of Public Works."

R. S. Q., Art. 5193 (4). "The authority of any such inspecting engineer shall be sufficiently evidenced by instructions (signed by the chairman of the Railway Committee, and countersigned by the secretary thereof.)" (a)
N. B., 1891, ch. 18. Same as Ontario.

R. S. N. S., ch. 53, sec. 43 (4). Same as Quebec, excepting (a) "Signed by the Commissioner of Public Works."

Penalty for
obstructing
inspecting en-
gineer.

30. Every person who willfully obstructs any inspecting engineer in the execution of his duty is liable (on summary conviction) (1) to a penalty not exceeding forty dollars, (2) and in default of payment thereof forthwith, or within such time as the convicting justice or justices of the peace appoint, (3) to imprisonment (with or without hard labor) (4) for any term not exceeding three months. (5)

R. S. Q., Art. 5215.—(1) "On conviction before a justice of the peace having jurisdiction in the place where the offence has been committed," (2) "for every such offence," (3) "the justice of the peace, or any other justice of the peace, having jurisdiction in the place where the offender resides, may commit the offender," (4) omitting "with or without hard labor," (5) additional; "but such commitment shall cease on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing sessions of the peace in the usual manner."

INCORPORATION.

Company to
have corpo-
rate powers.

31. Every company incorporated under a special Act shall be a body corporate, under the name declared in the special Act, and shall be vested with all such powers, privileges and immunities as are necessary to carry into effect the intention and objects of this Act and of the special Act, and which are incident to such corporation, or are expressed or included in ("The Interpretation Act"). (1)

R. S. O., ch. 170, sec. 8.

R. S. Q., Art. 5131—(1) "Civil Code."

R. S. M., ch. 130, sec. 9—(1) "Manitoba Interpretation Act."

R. S. N. S., ch. 53, sec. 6. Same as Dominion, excepting "or are expressed or included in 'the interpretation act'" omitted.

OFFICES OF COMPANY.

32. The head office of the company shall be in the place designated in the special Act; but the board of directors may establish one or more offices in other places in Canada or elsewhere.

PROVISIONAL DIRECTORS AND THEIR POWERS.

33. The persons mentioned by name as such in the special Act are hereby constituted provisional directors of the company, and of such provisional directors a majority shall be a quorum, and the said provisional directors shall hold office as such until the first election of directors, and may forthwith open stock books and procure subscriptions of stock for the undertaking, and receive payments on account of stock subscribed, and cause plans and surveys to be made, and deposit in any chartered bank of Canada moneys received by them on account of stock subscribed,—which moneys shall not be withdrawn, except for the purposes of the undertaking, or upon the dissolution of the company for any cause whatsoever.

Provisional directors and their powers.
Moneys deposited to be withdrawn for certain purposes only.

34. If more than the whole stock has been subscribed, the provisional directors shall allocate and apportion the authorized stock among the subscribers, as they deem most advantageous and conducive to the furtherance of the undertaking.

CAPITAL.

35. The capital stock of the company, the amount of which shall be stated in the special Act, shall be divided into shares of one hundred dollars each; and the money so raised shall be applied, in the first place, to the payment of all fees, expenses and disbursements for procuring the passing of the special Act, and for making the surveys, plans and estimates of the works authorized by the special Act; and all the remainder of such money shall be applied to the making, equipping, completing and maintaining of the said railway and other purposes of the undertaking.

Capital stock and shares.
Application thereof.

36. So soon as twenty-five per cent. of the capital has been subscribed, and ten per cent. of the amount subscribed has been paid into some chartered bank in Canada, the provisional

First meeting of shareholders.

directors shall call a meeting of the shareholders of the company at the place where the head office is situate, at such time as they think proper,—giving the notice prescribed by section forty-one of this Act,—at which meeting *the shareholders who have paid at least ten per cent. on the amount of stock subscribed for by them shall*, from the shareholders possessing the qualifications hereinafter mentioned, elect the number of directors prescribed by the special Act.

Notice thereof.
Election of directors.

R. S. Q., Art 5134 (25). "No owner or holder of shares in any iron or wooden railway company, incorporated by Act of the Legislature of this Province, shall, in any case, vote, by reason of any of his shares, unless he has paid upon such share an amount of at least ten per cent."

37. The original capital stock of any company may (with the approval of the Governor in Council) (1) be increased, from time to time, to any amount, if such increase is sanctioned by a vote, in person or by proxy, of the shareholders who hold at least two-thirds in amount of the subscribed stock of the company, at a meeting expressly called by the directors for that purpose, by a notice in writing to each shareholder, delivered to him personally, or properly directed to him, and deposited in the post office (2) at least twenty days previously to such meeting, stating the time, place and object of such meeting, and the amount of the proposed increase; and the proceedings of such meeting shall be entered in the minutes of the proceedings of the company, and thereupon the capital stock may (with such approval) (3) be increased to the amount sanctioned by such vote. (4)

How capital stock may be increased.
Entry on minutes.

R. S. O., ch. 170, sec. 37 (6).—(1) Omitting "with the approval of the Governor in Council," (2) "nearest to his place of residence," (3) Omitting "with such approval."

R. S. Q., Art. 5132 (19) (20). Same as Dominion Act, excepting (1) omitting "with the approval of the Governor in Council," (3) omitting "with such approval."

R. S. M., ch. 130, sec. 94. Same as Ontario.

N. B., 1891, ch. 18, sec. 29 (6). Same as Ontario.

R. S. N. S., ch. 53, sec. 7 (19). Same as Dominion, excepting (1) & (3) omitted. (4) "Provided that no increase of the Capital Stock shall be made without an act of the Legislature being first obtained therefor."

38. Municipal corporations in any Province in Canada duly empowered so to do by the laws of the Province, and subject to the limitations and restrictions in such laws prescribed, may subscribe for any number of shares in the capital stock of the com-

When and how municipal corporations may take stock.

pany; and the mayor, warden, reeve or other head officer of any such corporation holding stock to the amount of twenty thousand dollars, or upwards, shall be *ex-officio* one of the directors of the company, in addition to the number of directors authorized by the special Act (unless in such special Act provision is made for the representation of such corporation on the board thereof). (1)

R. S. O., ch. 170, sec. 39 (1). Municipal corporations in this Province may subscribe for any number of shares in the capital stock of, or lend to or guarantee the payment of any sum of money borrowed by the company from any corporation or person, or endorse or guarantee the payment of any debenture to be issued by the company for the money by them borrowed, and may assess and levy from time to time upon the whole ratable property of the municipality a sufficient sum for them to discharge the debt or engagement so contracted, and for the like purpose may issue debentures payable at such times and for such sums respectively, not less than \$20, and bearing or not bearing interest, as such municipal corporation thinks meet.

Sec. 2. Any such debenture issued, endorsed or guaranteed shall be valid and binding upon the municipal corporation, if signed or endorsed, and countersigned by the officer or person, and in such manner and form as directed by any by-law of the corporation, and the seal of the corporation thereto shall not be necessary, nor the observance of any other form with regard to the debentures than as directed in the by-law.

Sec. 3. No municipal corporation shall subscribe for stock or incur any debt or liability under this Act or the special Act, unless and until a by-law to that effect has been duly made, and adopted, with the consent first had of a majority of the qualified electors of the municipality, to be ascertained in the manner provided by *The Municipal Act*, after public advertisement thereof containing a copy of such proposed by-law, inserted at least four times in each newspaper printed within the limits of the municipality; or if none be printed therein, then in some one or more newspapers printed in the nearest city or town thereto, and circulated therein, and also put up in at least four of the most public places in each municipality. See also cap. 184, s. 634. R. S. O.

Sec. 4. The mayor, warden or reeve, or other chief officer of a municipal corporation subscribing for and holding stock in the company to the amount of \$20,000, or upwards, shall be *ex-officio* one of the directors of the company, in addition to the number of directors authorized by the special Act, and shall have the same rights, powers and duties as any of the directors of the company. See also cap. 184, s. 635. R. S. O.

Sec. 5. No such mayor, warden, reeve or other chief officer or other person representing any municipality (1) having or taking stock in any railway company shall, directly or indirectly, vote on the election or appointment of the private directors of any railway company (incorporated previous to or during the Session held in the sixteenth year of Her Majesty's reign, unless the special Act of incorporation of such company expressly provides therefor). (2)

R. S. Q., Art. 5138 (2), same as Dominion Act, excepting (1) omitting "unless in such special Act provision is made for the representation of such corporation on the board thereof;" and the following additional: "When, in a parish comprising a parish municipality and a village municipality, the council of both municipalities shall have agreed as to the subscription of shares to a railway company, which entitles to a representation on the board

of direction of such company, the mayor of each such two municipalities shall, alternately, be a director *ex-officio*, in such company, each for one year, commencing and changing on the first of January of each year, and to be commenced by the mayor of the parish municipality; provided that the amount of stock or shares thus owned by each of the two municipalities be at least ten thousand dollars."

Sec. 3. "Any such directors shall have the same rights as directors of municipalities which have subscribed for twenty thousand dollars of shares."

R. S. Q., Art. 5134 (23), same as R. S. O., ch. 170, sec. 39 (5), excepting (1) additional "or corporation of any town," and omitting (2).

R. S. N. S., ch. 53, sec. 23 (2). Same as Dominion, excepting (1) "But in case any such Municipal Corporation shall appoint some person specially to the office of Director in the Company, such person so specially appointed shall act as Director of the Company *ex-officio* instead of the mayor, reeve or warden, as in this section provided."

Paid up stock
may be issued
in certain
cases.

39. The directors of the company elected by the shareholders may make and issue, as paid up stock, shares in the company, whether subscribed for or not, and may allot and hand over such stock in payment for right of way, plant, rolling stock or materials of any kind, and also for the services of contractors and engineers; and such issue and allotment of stock shall be binding on the company, and such stock shall not be assessable for calls.

N. B., 1891, ch. 18, sec. 29 (8).

MEETINGS OF SHAREHOLDERS.

Annual meet-
ings.

Special meet-
ings.

Where to be
held.

40. A general meeting of the shareholders for the election of directors and for the transaction of other business connected with or incident to the undertaking, to be called "the annual meeting," shall be held annually on the day mentioned in the special Act; and other general meetings, to be called "special meetings," may be called at any time by the directors, or by shareholders representing at least one-fourth in value of the subscribed stock, if the directors, having been requested by such shareholders to convene such special meeting for twenty-one days thereafter fail to call such meeting;

2. All general meetings, whether annual or special, shall be held at the head office of the company.

R. S. O., ch. 170, sec. 32. "The shareholders may assemble together at general meetings, for purposes connected with or belonging to the undertaking, and at any annual general meeting, and may elect directors in the manner provided by (sec. 34). (1)

R. S. Q., Art. 5133. Same as Ontario, sec. 32, excepting (1) "the following article" (5134).

Also "after thirty days following the general annual meeting of the shareholders for the election of directors of the different companies, which is held on the day fixed by the charter of each company, it shall be the duty of the board of directors and of the secretary to call a general meeting of the shareholders, whenever required to do so, by a requisition in writing signed by one or more shareholders, holding at least one-half of the subscribed capital stock of the company, for the transaction of such business as may be set forth in the said requisition, which business shall be mentioned in the notice calling the meeting."

R. S. M., ch. 130, sec. 50. Same as Ontario, sec. 32, excepting (1) "this Act."

N. B., 1891, ch. 18, sec. 24. Same as Ontario, sec. 32, excepting (1) "sec. 26."

R. S. N. S., ch. 53, sec. 18. Same as Ontario.

41. At least four weeks' public notice of any meeting shall be given by advertisement published in the *Canada Gazette*, and in at least one newspaper published in the place where the head office is situate, —in which notice shall be specified the place and the day and the hour of meeting; all such notices shall be published weekly, and a copy of such *Gazette* containing such notice shall, on production thereof, be evidence of the sufficiency of such notice.

R. S. O., ch. 170, sec. 33. "The method of calling general meetings, and the time and place of the first meeting of shareholders for the appointment of directors, shall be determined and settled in the special Act."

R. S. M., ch. 130, sec. 51. Same as Ontario.

N. B., 1891, ch. 18, sec. 25. Same as Ontario.

R. S. Q., Art. 5134 (5). Same as Ontario, and additional "nevertheless, if the number of shareholders do not exceed fifty, and if they all reside in the Dominion, such meetings, besides in the manner prescribed by the charter, may be convened by a registered letter, postage paid, and deposited in the post office at least fifteen days before that of the meeting."

"All notices of meetings of the company shall be published weekly in the Quebec Official Gazette, which shall be conclusive evidence of the sufficiency of such notice."

R. S. N. S., ch. 53, sec. 20 (2). Same as Quebec, latter part.

42. Any business connected with or incident to the under-
taking may be transacted at an annual meeting, excepting such business as by this Act or the special Act is required to be transacted at a special meeting; but no special meeting shall enter upon any business not set forth in the notice upon which it is convened.

What business may be transacted.

43. The number of votes to which each shareholder shall be entitled, on every occasion when the votes of the shareholders are to be given, shall be in the proportion of the number of

Votes on shares.

shares held by him (and on which all calls due have been paid). (1)

R. S. O., sec. 34 (5). Same as Dominion, excepting (1) omitting "and on which all calls due have been paid," and substituting "unless otherwise provided by the special Act."

R. S. Q., 5134 (6). Same as Ontario.

R. S. M., ch. 130, sec. 56. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (5). Same as Dominion, excepting additional "unless provided by special Act."

R. S. N. S., ch. 53, sec. 19 (6). Same as Ontario.

Shareholders
may vote by
proxy.

44. Every shareholder, whether resident in Canada (1) or, elsewhere, may vote by proxy, if he sees fit, and if such proxy produces from his constituent an appointment in writing, in the words or to the effect following, that is to say:—

Form of
proxy.

I, _____ of _____, one of the shareholders of the _____ do hereby appoint _____ of _____, to be my proxy, and in my absence, to vote or give my assent to any business, matter or thing relating to the undertaking of the said _____ that is mentioned or proposed at any meeting of the shareholders of the said company; (2) in such manner as he, the said _____ thinks proper. In witness whereof, I have hereunto set my hand and seal, the day of _____ in the year _____

R. S. O., ch. 170, sec. 34 (6).—(1) "this Province,"

R. S. Q., Art. 5134 (7).—(1) "this Province, (2) "or any of them."

R. S. M., ch. 130, sec. 57. Same as Quebec.

N. B., 1891, ch. 18, sec. 26 (6).—(1) "this Province."

R. S. N. S., ch. 53, sec. 19 (7). Same as Dominion.

Votes by
proxy valid.

45. The votes by proxy shall be as valid as if the constituents had voted in person; and every matter or thing proposed or considered at any (1) meeting of the shareholders shall be determined by the majority of votes and proxies then present and given; and all decisions and acts of any such majority shall bind the company and be deemed the decisions and acts of the company.

Majority to
govern.

R. S. O., ch. 170, sec. 34 (7). (1) "public."

R. S. Q., Art. 5134 (8). Same as Ontario.

R. S. M., ch. 130, sec. 58. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (7). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (8). Same as Ontario.

PRESIDENT AND DIRECTORS.

46. A board of directors of the company to manage its affairs, Election of the number of whom shall be stated in the special Act, and a board of directors majority of whom shall form a quorum, shall be chosen at the annual meeting; and if such election is not held on the day appointed therefor, the directors shall cause such election to be held at a special meeting duly called for that purpose within as short a delay as possible after the day so appointed.

R. S. O., ch. 170, sec. 34 (1). "A board of directors of the undertaking, to manage its affairs (the number whereof shall be stated in the special Act) (a) shall be chosen annually by a majority of the shareholders voting at such election at a general meeting, the time and place for which shall be appointed by the special Act; and if the election is not held on the day so appointed, the directors shall notify and cause the election to be held within (thirty days after the day) (b) appointed."

R. S. M., ch. 130, sec. 52. Same as Ontario.

R. S. Q., Art. 5184 (1). Same as Ontario, excepting (b) substitute "as short a delay as possible after the day so appointed."

N. B., 1891, ch. 18, sec. 26. Same as Ontario, excepting (a) substitute "the number of whom shall not exceed seven, as may be fixed by by-law of the company," also (b) substitute "as soon as practicable after the day appointed."

R. S. N. S., ch. 53, sec. 19 (1). Same as Quebec.

47. No person shall vote on such subsequent day except As to votes at those who would have been entitled to vote if the election had adjourned meeting been held on the day when it should have been held.

R. S. O., ch. 170, sec. 34 (2).

R. S. Q., Art. 5134 (2).

R. S. M., ch. 130, sec. 53.

N. B., 1891, ch. 18, sec. 26 (2).

R. S. N. S., ch. 53, sec. 19 (2).

48. Vacancies in the board of directors shall be filled in the Vacancies, manner prescribed by the by-laws. how filled.

R. S. O., ch. 170, sec. 34 (3).

R. S. Q., Art. 5134 (3).

R. S. M., ch. 130, sec. 54.

N. B., 1891, ch. 18, sec. 26 (3).

R. S. N. S., ch. 53, sec. 19 (3).

49. No person shall be a director, unless he is a shareholder, Qualification owning (twenty shares of) (1) stock absolutely in his own right of director. (and has paid all calls due thereon), (2) and is qualified to vote for directors at the election at which he is chosen.

R. S. O., ch. 170, sec. 34 (4)—(1) Omitted, (2) omitted.

R. S. Q., Art. 5134 (4). Same as Ontario.

R. S. M., ch. 130, sec. 55. Same as Ontario.
 N. B., 1891, ch. 18, sec. 26 (4). Same as Ontario.
 R. S. N. S., ch. 53, sec. 19 (4). Same as Ontario.

Term of office. **50.** The directors appointed at the last election, or those appointed in their stead in case of vacancy, shall remain in office until the next ensuing election of directors.

R. S. O., ch. 170, sec. 34 (8). "The directors first appointed, or those appointed in their stead, in case of vacancy, shall remain in office until the next annual election of directors at the time appointed therefor, at which time an annual general meeting of the shareholders shall be held, to choose directors for the ensuing year, and generally to transact the business of the company."

R. S. Q., Art. 5134 (9). Same as Dominion Act.
 R. S. M., ch. 130, sec. 59. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (8). "The directors first appointed, or those appointed in their stead, in case of vacancy, shall remain in office until the next annual election of directors."

R. S. N. S., ch. 53, sec. 19 (9).

Vacancies by death, etc., how filled. **51.** In case of the death, absence or resignation of any of the directors, others may (unless otherwise prescribed by the by-laws) (1) be appointed in their stead by the surviving directors; but if such appointment is not made, such death, absence or resignation shall not invalidate the acts of the remaining directors.

R. S. O., ch. 170, sec. 34 (9)—(1) Omitted.
 R. S. Q., Art. 5134 (10). Same as Ontario.
 R. S. M., ch. 130, sec. 60. Same as Ontario.
 N. B., 1891, ch. 18, sec. 26 (9). Same as Ontario.
 R. S. N. S., ch. 53, sec. 19 (10). Same as Ontario.

President. **52.** The directors shall, at their first or at some other meeting after the (election) (1) elect one of their number to be the president of the company, who shall always, when present, be the chairman of and preside at all meetings of the directors, and shall hold his office until he ceases to be a director, or until another president has been elected in his stead; and they may, in like manner, elect a vice-president, who shall act as chairman in the absence of the president.

Vice-president.

R. S. O., ch. 170, sec. 34 (10)—(1) Substitute "day appointed for the annual general meeting."

R. S. Q., Art. 5134 (11). Same as Dominion Act.
 R. S. M., ch. 130, sec. 61. Same as Ontario.
 N. B., 1891, ch. 18, sec. 26 (10). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (11), as amended by 51 Vic., ch. 20. Same as Dominion.

53. The directors, at any meeting at which not less than a quorum (1) are present, shall be competent to use and exercise all and any of the powers vested in the directors.

R. S. O., ch. 170, sec. 34 (11)—(1) Additional "to be settled by the special Act."

R. S. Q., Art. 5134 (12). Same as Ontario.

R. S. M., ch. 130, sec. 62. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (11).—(1) "which quorum shall consist of a majority of the Board."

R. S. N. S., ch. 53, sec. 19 (12).

54. The act of a majority of a quorum of the directors present at any meeting regularly held shall be deemed the act of the directors.

R. S. O., ch. 170, sec. 34 (12).

R. S. M., ch. 130, sec. 63.

R. S. Q., Art. 5134 (13).

N. B., 1891, ch. 18, sec. 26 (12).

R. S. N. S., ch. 53, sec. 19 (13).

55. No director shall have more than one vote except the chairman, who shall, in case of a division of equal numbers, have the casting vote.

R. S. O., ch. 170, sec. 34 (13).

R. S. Q., Art. 5134 (14).

R. S. M., ch. 130, sec. 64.

N. B., 1891, ch. 18, sec. 26 (13).

R. S. N. S., ch. 53, sec. 19 (14).

56. The directors shall be subject to the examination and control of the shareholders at their annual meetings, and shall be subject to all by-laws of the company, and to the orders and directions from time to time made (or given) (1) at the annual or special meetings; but such orders and directions shall not be contrary to any express directions or provisions of this Act or of the special Act.

R. S. O., ch. 170, sec. 34 (14)—(1) Omitted.

R. S. Q., Art. 5134 (15). Same as Ontario.

R. S. M., ch. 130, sec. 65. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (14). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (15). Same as Ontario.

57. No person who holds any office, place or employment in, or who is concerned or interested in any contract under or with the company, or is surety for any contractor, shall be capable of being chosen a director, or of holding the office of director, nor

shall any person who is a director of the company enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company, other than a contract which relates to the purchase of land necessary for the railway, or be or become a partner of or surety for any contractor with the company.

R. S. O., ch. 170, sec. 34 (15). No person holding any office, place or employment in, or being concerned or interested in any contracts under or with the company, shall be capable of being chosen a director, or of holding the office of director, nor shall any person, being a director of the company, enter into or be directly or indirectly, for his own use and benefit, interested in any contract with the company, not relating to the purchase of land necessary for the railway, or be or become a partner of any contractor with the company (and in the event of any such contract made since the 30th day of June, 1858, or made after this Act takes effect, by or on behalf of any director, an action shall lie in any Court of competent jurisdiction against such director, at the suit of any shareholder of the company, for the benefit of the funds thereof, for the whole amount of profit accruing to such director from the contract so made or fulfilled). (1)

R. S. Q., Art. 5134 (16). Same as Ontario, excepting latter part (1) omitted.

R. S. M., ch. 130, sec. 66. Same as Ontario, excepting in place of "30th day of June, 1858, or made after this Act takes effect," read "25th day of May, 1881."

Also after "Court" add "of common law."

N. B., 1891, ch. 18, sec. 26 (15). Same as Ontario, excepting omission of "30th day of June, 1858."

R. S. N. S., ch. 53, sec. 19 (16). Same as Quebec.

By-laws to be made.

58. The directors shall make by-laws for the management and disposition of the stock, property, business and affairs of the company, not inconsistent with the laws of (Canada), (1) and for the appointment of all officers, servants and artificers, and prescribing their respective duties.

R. S. O., ch. 170, sec. 34 (17)—(1) "this Province."

R. S. Q., Art. 5134 (17)—(1) Read "law" instead of "laws of Canada,"

R. S. M., ch. 130, sec. 67. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (16). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (17). Same as Quebec.

Appointment of officers and security to be given by them.

59. The directors shall, from time to time, appoint such officers as they deem requisite, and shall take sufficient security, by one or more (1) bonds (or by the guarantee of any society or joint stock company incorporated and empowered to grant guarantees, bonds, covenants or policies for the integrity and faithful accounting of persons occupying positions of trust, or for other like purposes, as they deem expedient) (2) from the managers and

officers for the time being, for the safe keeping and accounting for by them respectively of the moneys raised by virtue of this Act and the special Act, and for the faithful execution of their duties, as the directors think proper.

R. S. O., ch. 170, sec. 34 (17).—(1) Ad 1 "penal," (2) replace by "or otherwise."

R. S. Q., Art. 5134 (18).—(2) Replace by "or by the guarantee of the Canada Guarantee Company, or of any society incorporated for like purposes or otherwise, as they may deem expedient."

R. S. M., ch. 130, sec. 68. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (17). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (18). Same as Quebec.

60. In case of the absence or illness of the president, the vice-president shall have all the rights and powers of the president, and may sign all notes, bills, debentures and other instruments, and perform all acts which, by the regulations and by-laws of the company, or by the (special Act) (1) are required to be signed, performed and done by the president.

R. S. O., ch. 170, sec. 34 (18).—(1) "Acts incorporating the Company."

R. S. Q., Art. 5134 (19). Same as Dominion Act.

R. S. M., ch. 130, sec. 69. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (18). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (19). Same as Ontario.

61. The directors may at any meeting (of directors), (1) require the secretary to enter such absence or illness among the proceedings of such meeting; and a certificate thereof, signed by the secretary, shall be delivered to any person (2) requiring the same, on payment to the treasurer of one dollar, and such certificate shall be taken and considered as *prima facie* evidence of such absence or illness, at and during the period in the said certificate mentioned, in all proceedings in courts of justice or otherwise.

R. S. O., ch. 170, sec. 34 (19).—(1) Omitted, (2) "or persons."

R. S. Q., Art. 5134 (20).—(1) Omitted.

R. S. M., ch. 130, sec. 70. Same as Ontario.

N. B., 1891, ch. 18, sec. 26 (19). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (20). Same as Ontario.

62. The directors shall cause to be kept and, annually, on the thirtieth day of June, (1) to be made up and balanced, a true, exact and particular account of the moneys collected and received by the company or by the directors or (managers) (2) thereof, or otherwise, for the use of the company, and of the charges and ex-

penses attending the erecting, making, supporting, maintaining and carrying on of the undertaking, and of all other receipts and expenditures of the company or the directors.

R. S. O., ch. 170, sec. 34 (20).—(1) "December,"

R. S. Q., Art. 5134 (21). Same as Ontario.

R. S. M., ch. 130, sec. 71. Same as Ontario, excepting (2) "management."

N. B., 1891, ch. 18, sec. 26 (20). Same as Ontario.

R. S. N. S., ch. 53, sec. 19 (21). Same as Ontario.

CALLS.

Calls and notice thereof.

63. The directors may, from time to time, make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they deem necessary; and at least thirty days' notice shall be given of each call,—and no call shall exceed the amount prescribed in the special Act, or be made at a less interval than two months from the previous call,—nor shall a greater amount be called in, in any one year, than the amount prescribed in the special Act (but nothing herein contained shall prevent the directors from making more than one call by one resolution of the board: Provided, that the intervals between such calls, the notices of each call, and the other provisions of this Act and of the special Act, in respect of calls, are duly observed and given). (1)

More than one call by one resolution.

Proviso.

R. S. O., ch. 170, sec. 35 (1).—(1) Omitted.

R. S. Q., Art. 5135 (1). Same as Ontario.

R. S. M., ch. 130, sec. 72. Same as Ontario.

N. B., 1891, ch. 18, sec. 27. Same as Dominion Act.

R. S. N. S., ch. 53, sec. 20 (1). Same as Ontario.

Publication of notice of call.

64. All notices of calls upon the shareholders of the company shall be published as provided by section forty-one of this Act, and a copy of the *Gazette* therein mentioned shall, on production thereof, be evidence of the sufficiency of such notice.

R. S. O., ch. 170, sec. 35 (2). "All notices of *meetings* or of calls upon the shareholders of the company shall be published weekly in the Ontario (*a*) *Gazette*, and the said *Gazette* shall, on production thereof, be conclusive evidence of the sufficiency of such notices."

R. S. Q., Art. 5135 (2). Same as Ontario, excepting "meetings" omitted.

R. S. M., ch. 130, sec. 102. "All notices of meetings or of calls upon the shareholders of the company shall be published in the Manitoba *Gazette* for at least thirty days; and the said *Gazette* shall, on production thereof, be conclusive evidence of the sufficiency of such notices."

N. B., 1891, ch. 18, sec. 27 (2). Same as Ontario, excepting (*a*) "Royal Gazette."

R. S. N. S., ch. 53, sec. 20 (2). Same as New Brunswick.

65. Every shareholder shall be liable to pay the amount of the payment of calls so made in respect of the shares held by him, to the persons calls, and at the times and places from time to time appointed by the company or the directors.

R. S. O., ch. 170, sec. 35 (3).

R. S. Q., Art. 5135 (3).

R. S. M., ch. 130, sec. 73.

N. B., 1891, ch. 18, sec. 27 (3).

R. S. N. S., ch. 53, sec. 20 (3).

66. If, on or before the day appointed for payment of any call, Interest on any shareholder does not pay the amount of such call, he shall overdue calls. be liable to pay interest for the same, at the (1) (rate of six per centum per annum) (2) from the day appointed for the payment thereof to the time of the actual payment.

R. S. O., ch. 170, sec. 35 (4).—(1) "Legal," (2) "for the time being."

R. S. Q., Art. 5135 (4). Same as Dominion Act, omitting "at the rate of six per centum per annum."

R. S. M., ch. 130, sec. 74. Same as Ontario.

N. B., 1891, ch. 18, sec. 27 (4). Same as Dominion Act.

R. S. N. S., ch. 53, sec. 20 (4). Same as Dominion.

67. If, at the time appointed for the payment of any call, any Recovery by shareholder fails to pay the amount of the call, he may be sued suit. for the same in any court of (1) competent jurisdiction, and the same shall be recoverable, with lawful interest (2) from the day on which the call became payable.

R. S. O., ch. 170, sec. 35 (5).

R. S. Q., Art. 5135 (5).

R. S. M., ch. 130, sec. 75.—(1) "law or equity having."

N. B., 1891, ch. 18, sec. 27 (5).—(2) "at the rate of six per cent."

R. S. N. S., ch. 53, sec. 20 (5). Same as Dominion.

68. In any action (or suit) (1) to recover any money due upon What allegations only necessary in suits for calls. any call, it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is the holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, in respect of one call or more, upon one share or more, stating the number and amount of each of such calls, whereby an action has accrued to the company. (2)

R. S. O., ch. 170, sec. 35 (6).—(1) Omitted, (2) additional "by virtue of the special Act."

R. S. Q., Art. 5135 (6). Same as Dominion Act, excepting (2) "by virtue of the charter."

R. S. M., ch. 130, sec. 76. Same as Quebec.

N. B., 1891, ch. 18, sec. 27 (6). Same as Ontario.

R. S. N. S., ch. 53, sec. 20 (6). Same as Quebec.

DIVIDENDS AND INTEREST.

Declaration
of dividend.

69. At the annual meeting of the shareholders of the company, a dividend may be declared out of the net profits of the undertaking.

R. S. O., ch. 170, sec. 36 (1). "At the general meetings (a) of the shareholders of the undertaking, from time to time holden, a dividend shall be made out of the clear profits of the undertaking, unless such meetings declare otherwise."

R. S. Q., Art. 5136 (1). Same as Ontario, excepting (a) "meetings" in singular.

R. S. M., ch. 130, sec. 84. Same as Ontario.

N. B., 1891, ch. 18, sec. 28 (1). Same as Ontario.

R. S. N. S., ch. 53, sec. 21 (1). Same as Ontario.

Rate of
dividend.

70. Such dividend shall be at and after the rate of so much per share upon the several shares held by the shareholders in the stock of the company, as such meeting thinks fit to appoint or determine.

R. S. O., ch. 170, sec. 36 (2).

R. S. Q., Art. 5136 (2).

R. S. M., ch. 130, sec. 85.

N. B., 1891, ch. 18, sec. 28 (2).

R. S. N. S., ch. 53, sec. 21 (2).

Dividend not
to impair cap-
ital, etc.

71. No dividends shall be declared whereby the capital of the company is in any degree reduced or impaired, or be paid out of such capital, nor shall any dividend be paid, in respect of any share, after a day appointed for payment of any call for money in respect thereof, until such call has been paid; but the directors may, in their discretion, until the railway is completed and opened to the public, pay interest (at any rate *not exceeding six per centum per annum*) (1) on all sums called up in respect of the shares, from the respective days on which the same have been paid; and such interest shall accrue and be paid at such times and places as the directors appoint for that purpose.

R. S. O., ch. 170, sec. 36 (3) (4).—(1) "At any rate authorized by the laws of Canada, but not exceeding six per centum per annum."

P. S. Q., Art. 5136 (3) (4).—(1) "At any rate per annum."

R. S. M., ch. 130, secs. 86, 87. Same as Ontario, substituting "eight per centum" for "six per centum."

N. B., 1891, ch. 18, sec. 28 (3) (4). Same as Dominion Act.

R. S. N. S., ch. 53, sec. 21 (3) (4).

No interest
on share in
arrear.

72. No interest shall accrue to (any shareholder) (1) in respect of any share upon which any call is in arrear, or in respect to any other share held by such shareholder while such call remains unpaid. (2)

R. S. O., ch. 170, sec. 36 (5).—(1) "The proprietors of any share,"
(2) additional "nor shall any interest be paid or taken from the capital sub-
scribed."

R. S. Q., Art. 5136 (5).—(1) "The proprietors of any share."

R. S. M., ch. 130, sec. 88. Same as Ontario.

N. B., 1891, ch. 18, sec. 28 (5). Same as Ontario.

R. S. N. S., ch. 53, sec. 21 (5). Same as Quebec.

SHARES.

73. Shares in the (company) (1) may, by the (holders Shares may
thereof) (2) be sold and (transferred)(3) by instrument in writing, be transferred
made in duplicate,—one part of which shall be delivered to the
directors, to be filed and kept for the use of the company, and
an entry whereof shall be made in a book to be kept for that
purpose; and no interest (or dividend) (4) on the shares trans-
ferred shall be paid (to) (5) the purchaser until such duplicate
is so delivered, filed and entered.

R. S. O., ch. 170, sec. 37 (1).— 1) "undertaking," (2) "parties," (3)
"disposed of," (4) omitted.

R. S. Q., Art. 5137. Same as Ontario.

R. S. M., ch. 130, sec. 89. Same as Ontario, excepting (5) "by"?

N. B., 1891, ch. 18, sec. 29 (1). Same as Dominion, excepting (1)
"undertaking," (2) "parties," (3) "disposed of."

R. S. N. S., ch. 53, sec. 22 (1). Same as Ontario excepting (4) remains.

74. (Transfers) (1) (except in the case of fully paid up Form of
shares) (2) shall be in the form following, or to the like effect, transfer.
varying the names and descriptions of the contracting parties as
the case requires, that is to say :—

I, A. B., in consideration of the sum of _____, paid to
me by C. D., hereby sell and transfer to him _____ share (or
shares) of the stock of the _____, to hold to him,
the said C. D., his heirs, executors, administrators, and assigns
(or successors and assigns, as the case may be) (3) subject to
the same rules and orders and on the same conditions that I
held the same immediately before the execution hereof. And
I, the said C. D., do hereby agree to accept of the said — share
(or shares) subject to the same rules, orders and conditions.
Witness our hands this _____ day of _____ in the year
18 .

(2. In the case of fully paid shares the transfer may be in As to paid-up
such form as is prescribed by by-law of the company.) (4) shares.

R. S. O., ch. 170, sec. 37 (2). (1) "sales," (2) omitted, (3) omitted, (4) omitted.

R. S. Q., Art. 5137 (2). Same as Ontario.

R. S. M., ch. 130, sec. 90. Same as Ontario, excepting (1) "transfers" instead of "sales."

N. B., 1891, ch. 18, sec. 29 (2). Same as Ontario.

R. S. N. S., ch. 53, sec. 22 (2). Same as Ontario.

Shares personal property, etc.

75. The stock of the company shall be personal property; but no shares shall be transferable until all previous calls thereon have been (fully) (1) paid up, or until the said shares have been declared forfeited for the non-payment of calls thereon; and no transfer of less than a whole share shall be valid.

R. S. O., ch. 170, sec. 37 (3).

R. S. Q., Art. 5137 (3).

R. S. M., ch. 130, sec. 91.—(1) Omitted.

N. B., 1891, ch. 18, sec. 29 (3).

R. S. N. S., ch. 53, sec. 22 (3).

Transmission otherwise than by transfer.

76. If any share in the capital stock of the company is transmitted by the death, bankruptcy or last will, donation or testament, or by the intestacy, of any shareholder, or by any lawful means other than the transfer hereinbefore mentioned, the person to whom such share is transmitted shall deposit in the office of the company a statement in writing, signed by him, which shall declare the manner of such transmission, together with a duly certified copy or probate of such will, donation or testament, or sufficient extracts therefrom, and such other documents or proof as are necessary; and without such proof the person to whom the share is so transmitted, as aforesaid, shall not be entitled to receive any part of the profits of the company, or to vote in respect of any such share as the holder thereof.

R. S. O., ch. 170, sec. 37 (4).

R. S. Q., art. 5137 (4).

R. S. M., ch. 130, sec. 92.

N. B., 1891, ch. 18, sec. 29 (4).

R. S. N. S., ch. 53, sec. 22 (4).

Company not bound to see to trusts, etc.

77. (*As amended by 55-56 Vic., ch. 27, sec. 2.*) The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any share or security issued by it is subject, and whether or not the company has had notice of the trust; and it may treat the registered holder as the absolute owner of any such share or security, and, accordingly, shall not be bound to recognize any claim on the part of

any other person whomsoever, with respect to any such share or security, or the dividend or interest payable thereon : Provided, that nothing herein contained shall prevent a person Proviso. equitably interested in any such share or security from procuring the intervention of the court to protect his rights.

R. S. O., ch. 170, sec. 37 (5). The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any of the shares may be subject ; and the receipt of the party in whose name any share stands in the books of the company, or if it stands in the name of more parties than one, the receipt of one of the parties named in the register of shareholders, shall from time to time be a sufficient discharge to the company for any dividend or other sum of money payable in respect of the share, notwithstanding any trust to which the share may then be subject, and whether or not the company have had notice of the trusts, and the company shall not be bound to see to the application of the money paid upon such receipts.

R. S. Q., Art. 5137 (5). Same as Ontario.

R. S. M., ch. 130, sec. 93. Same as Ontario.

N. B., 1891, ch. 18, sec. 29 (5). Same as Ontario.

R. S. N. S., ch. 53, sec. 22 (5). Same as Ontario.

78. The certificate of proprietorship of any share shall be admitted in all courts as *prima facie* evidence of the title of any shareholder, his executors, administrators or assigns, (or successors and assigns, as the case may be), (1) to the share therein specified. Certificate of proprietorship to be evidence.

R. S. O., ch. 170, sec. 35 (7).

R. S. Q., Art. 5135 (7).

R. S. M., ch. 130, sec. 77.

N. B., 1891, ch. 18, sec. 27 (7).

R. S. N. S., ch. 53, sec. 20 (7). Same as Dominion, omitting (1).

79. The want of such certificate shall not prevent the holder of any share from disposing thereof. Sale without certificate.

R. S. O., ch. 170, sec. 35 (8).

R. S. Q., Art. 5135 (8).

R. S. M., ch. 130, sec. 78.

N. B., 1891, ch. 18, sec. 27 (8).

R. S. N. S., ch. 53, sec. 20 (8).

80. Every person who neglects or refuses to pay a ratable share of the calls as aforesaid, for the space of two months after the time appointed for the payment thereof, shall forfeit to the company, for the benefit thereof, his shares in the company, and all the profit and benefit thereof. Penalty for refusal to pay calls.

R. S. O., ch. 170, sec. 35 (9).

R. S. Q., Art. 5135 (9).

R. S. M., ch. 130, sec. 79.

N. B., 1891, ch. 18, sec. 27 (9).

R. S. N. S., ch. 53, sec. 20 (9).

When only
forfeiture may
be taken ad-
vantage of.

81. No advantage shall be taken of the forfeiture unless the shares are declared to be forfeited at a general meeting of the company, assembled at any time after such forfeiture has been incurred.

R. S. O., ch. 170, sec. 35 (10).
R. S. Q., Art. 5135 (10).
R. S. M., ch. 130, sec. 79.
N. B., 1891, ch. 18, sec. 27 (10).
R. S. N. S., ch. 53, sec. 20 (10).

Effect of for-
feiture as to
liability.

82. Every such forfeiture shall be an indemnification to and for every shareholder so forfeiting, against all actions, suits or prosecutions whatsoever commenced or prosecuted for any breach of contract or other agreement between such shareholder and the other shareholders with regard to carrying on the undertaking.

R. S. O., ch. 170, sec. 35 (11).
R. S. Q., Art. 5135 (11).
R. S. M., ch. 130, sec. 80.
N. B., 1891, ch. 18, sec. 27 (11).
R. S. N. S., ch. 53, sec. 20 (11).

Forfeited
shares may be
sold.

83. The directors may sell, either by public auction or private sale, and in such manner and on such terms as to them seem meet, any shares so declared to be forfeited (or any unissued shares), (1) or may pledge such (2) shares for the payment of loans or advances made or to be made thereon, or for the payment of any sums of money borrowed by or advanced to the company (provided that authority for such purpose and for the issue of the stock be first given at a special general meeting of the shareholders called for the purpose). (3)

R. S. O., ch. 170, sec. 35 (12).—(1) Substitute "and also any shares remaining unsubscribed for in the capital stock of the company," (2) "forfeited or unsubscribed," (3) omitted.
R. S. Q., Art. 5135 (12). Same as Ontario.
R. S. M., ch. 130, sec. 81.
N. B., 1891, ch. 18, sec. 27 (12).
R. S. N. S., ch. 53, sec. 20 (12).

Certificate of
treasurer to
be evidence
of forfeiture
and of title of
purchaser.

84. A certificate of the treasurer of the company, that the forfeiture of the shares was declared, shall be sufficient evidence of the fact, and of their purchase by the purchaser; and such certificate, with the receipt of the treasurer for the price of such shares, shall constitute a good title to the shares; and the certificate shall be, by the said treasurer, registered in the name and

with the place of abode and occupation of the purchaser, and shall be entered in the books required to be kept by the by-laws of the company; and such purchaser shall thereupon be deemed the holder of such shares, and shall not be bound to see to the application of the purchase money,—and his title to such shares shall not be affected by any irregularity in the proceedings in reference to such sale; and any shareholder may purchase any shares so sold.

R. S. O., ch. 170, sec. 35 (13).

R. S. Q., Art. 5135 (13).

R. S. M., ch. 130, sec. 82.

N. B., 1891, ch. 18, sec. 27 (13).

R. S. N. S., ch. 53, sec. 20 (13).

85. Any shareholder who is willing to advance the amount Interest on
of his shares, or any part of the money due upon his shares be- sums paid in
yond the sums actually called for, may pay the same to the com- advance.
pany,—and upon the principal moneys so paid in advance, or
so much thereof as, from time to time, exceeds the amount of
the calls then made upon the shares in respect to which such
advance is made, the company may pay such interest (at the law-
ful rate of interest for the time being) (1) as the shareholders,
who pay such sum in advance, and the company agree upon;
but such interest shall not be paid out of the capital subscribed.

R. S. O., ch. 170, sec. 35 (14).

R. S. Q., Art. 5135 (14).

R. S. M., ch. 130, sec. 83.

N. B., 1891, ch. 18, sec. 27 (14).—(1) Omitted.

R. S. N. S., ch. 53, sec. 20 (14).

86. Every shareholder shall be individually liable to the cre- Liability of
ditors of the company for the debts and liabilities of the com- shareholders.
pany, to an amount equal to the amount unpaid on the stock
held by him, and until the whole amount of his stock has been
paid up; but no such shareholder shall be liable to an action in
respect of his said liability until an execution (at the suit of the
creditor) (1) against the company has been returned unsatisfied
in whole or in part. (2)

R. S. O., ch. 170, sec. 38 (1).—(1) Omitted, (2) additional "and the
amount due on such execution shall be the amount recoverable with costs
against such shareholder" (a)

R. S. Q., Art. 5138. Same as Dominion, excepting (1) omitted.

R. S. M., ch. 130, sec. 96. Same as Ontario, excepting (a) additional
"provided that the payment due on such execution is less than the unpaid
portion of the stock."

N. B., 1891, ch. 18, sec. 30. Same as Dominion, excepting (1) omitted.
 R. S. N. S., ch. 53, sec. 23 (1). Same as Dominion, excepting (1) omitted.

Aliens to
have equal
rights.

87. All shareholders in the company, whether British subjects or aliens, or resident in Canada or elsewhere, shall have equal rights to hold stock in the company, and to vote on the same, and shall be eligible to office in the company.

Record of
shareholders.

88. A true and perfect account of the names and places of abode of the several shareholders shall be entered in a book, which shall be kept for that purpose (and which shall be open to the inspection of the shareholders). (1)

R. S. O., ch. 170, sec. 32 (2).—(1) Substitute "as well as of the several persons also from time to time become proprietors of or entitled to any shares therein, and of all other acts, proceedings and transactions of the company and of the directors for the time being."

R. S. Q., Art. 5138 (4). Same as Dominion, excepting (1) omitted.

R. S. M., ch. 130, sec. 97. Same as Ontario.

N. B., 1891, ch. 18, sec. 30 (2). Same as Ontario.

R. S. N. S., ch. 53, sec. 23 (3). Same as Quebec.

LIMITATION OF TIME.

Time for con-
struction
limited.

89. If the construction of the railway is not commenced, and fifteen per cent. (1) on the amount of the capital stock is not expended thereon within two (2) years after the passing of the Act authorizing the construction of the railway, or if the railway is not finished and put in operation in seven (3) years from the passing of such Act (then the powers granted by such Act or by this Act shall cease and be null and void as respects so much of the railway as then remains uncompleted). (4)

R. S. O., ch. 170, sec. 44 (5).—(1) "ten per cent.," (2) "three years," (3) "ten years," (4) substitute "the corporate existence and powers of the company shall cease."

R. S. Q., Art. 5176 (3). Same as Ontario.

R. S. M., ch. 130, sec. 124. Same as Ontario.

N. B., 1891, ch. 18, sec. 35 (5). Same as Ontario.

R. S. N. S., ch. 53, sec. 27 (6).

GENERAL POWERS.

Powers.

90. The company may, subject to the provisions in this and the special Act contained:—

To enter lands
for surveys,
etc.

(a) Enter into and upon any lands of Her Majesty (1) without previous license therefor, or into and upon the lands of any (2) person whomsoever, lying in the intended route or line of

the railway; and make surveys, examinations or other necessary arrangements on such lands for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway.

R. S. O., ch. 170, sec. 9 (12) (13).—(1) Additional "the property of this province," (2) "Corporation or."

R. S. Q., Art. 5132 (12). Same as Dominion.

R. S. M., ch. 130, sec. 12 (i) (j). "To enter into and upon any lands of any corporation or person whatsoever lying in the intended route or line of railway." Remainder same as Dominion.

N. B., 1891, ch. 18, sec. 9 (12). Same as Ontario.

R. S. N. S., ch. 53, sec. 7 (12). Same as Ontario, excepting (1) "Crown land."

(h) Receive, take and hold all voluntary grants and donations of lands or other property (or any bonus of money or grants of land, etc. debenture, or other benefit of any sort) (1) made to it for the purpose of aiding in the construction, maintenance and accommodation of the railway; but the same shall be held and used for the purpose of such grants or donations only.

R. S. O., ch. 170, sec. 9 (1).—(1) Omitted.

R. S. Q., Art. 5132 (1).

R. S. M., ch. 130, sec. 16 (a).

N. B., 1891, ch. 18, sec. 9 (1).

R. S. N. S., ch. 53, sec. 7 (1). Same as Ontario.

(c) Purchase, take and hold of and from any (1) person, To purchase any lands or other property necessary for the construction, and sell land. maintenance, accommodation and use of the railway, and also alienate, sell or dispose of (so much thereof as is not necessary for the purposes of the railway). (2)

R. S. O., ch. 170, sec. 9 (2).—(1) "Corporation or," (2) substitute "the same." (a)

R. S. M., ch. 130, sec. 16 (b). Same as Ontario.

R. S. Q., Art. 5132 (2). Same as Ontario, excepting (a) additional, "at pleasure."

N. B., 1891, ch. 18, sec. 9 (2). Same as Ontario.

R. S. N. S., ch. 53, sec. 7 (2). Same as Ontario.

(d) Make, carry or place the railway across or upon the lands To carry rail- of any (1) person on the located line of the railway (or within way across one mile thereof, or within such further distance from such line lands. as is prescribed in the special Act). (2)

R. S. M., ch. 130, sec. 12 (a).—(1) "Corporation or," (2) omitted.

N. B., 1891, ch. 18, sec. 9 (4). (1) "Corporation," (2) substitute "or within the distance from such line stated in the special Act, although through error or other cause the name of such (a) party has not been entered in the book of reference hereinafter mentioned, or although some other

(a) party has been erroneously mentioned as the owner of, or entitled to convey, or is interested in such lands."

R. S. Q., Art. 5132 (4). Same as New Brunswick, excepting (a) "corporation or."

R. S. O., ch. 170, sec. 9 (4). Same as New Brunswick.

R. S. N. S., ch. 53, sec. 7 (4). Same as New Brunswick.

To fell trees. (e) Fell or remove any trees which stand within six rods from either side of the railway, or which are liable to fall across the railway track.

R. S. O., ch. 170, sec. 9 (14). "To fell or remove any trees standing in any woods, lands or forests where the railway passes, to the distance of six rods from either side thereof."

R. S. Q., Art. 5132 (13). Same as Ontario.

R. S. M., ch. 130, sec. 12 (k). Same as Ontario.

N. B., 1891, ch. 18, sec. 9 (13). Same as Dominion Act.

R. S. N. S., ch. 53, sec. 7 (13). Same as Ontario.

To cross, etc., other rail-ways. (f) Cross, intersect, join and unite the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for the purposes of such connection.

R. S. O., ch. 170, sec. 9 (15). Same as Dominion, and in case of any disagreement, see under sec. 176, *infra*.

R. S. Q., Art. 5132 (14). Same as Dominion, and see sec. 176, *infra*.

R. S. M., ch. 130, sec. 12 (l). "Subject to the provisions hereinafter contained (see sec. 176, *infra*) to cross, intersect, join and unite the railway with any other railway at any point on its route, and upon the lands of the owners of or used in connection with such other railway, with the necessary conveniences for the purposes of such connection, and the owners of both railways may unite in forming such intersection and grant the facilities therefor."

R. S. N. S., ch. 53, sec. 7 (14). Same as Dominion, and see sec. 176, *infra*.

To make bridges, tunnels, etc. (g) Make or construct in, upon, across, under or over any railway, tramway, river, stream, water-course, canal or highway which it intersects or touches, temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences.

R. S. O., ch. 170, sec. 9 (5). "To construct, maintain and work the railway across, along or upon any (stream of water) (1) water course, canal, highway or railway which it intersects or touches; but the (stream), (1) water course, canal, highway or railway (a) so intersected or touched shall be restored by the Company to its former state, or to such state as not to impair its usefulness (but this shall not authorize the obstruction of the navigation of any navigable waters). (2)

R. S. Q., Art. 5132 (5). Same as Ontario, excepting (1) "river," (2) substitute "subject always, however, to the authority and control of the Parliament of Canada, in so far as respects shipping and navigation."

R. S. M., ch. 130, sec. 12 (b). Same as Ontario excepting (a) "subject to the authority of the Legislature of this Province."

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N. B., 1891, ch. 18, sec. 9 (5). Same as Ontario, adding word "ditch" after "water-course."

R. S. N. S., ch. 53, sec. 7 (5), amended by 58 Vic., ch. 13. Same as Ontario. Omitting (2), and including (4) and (i) Dom. Act.

(h) Divert or alter, as well temporarily as permanently, the course of any such river, stream, water-course or highway, or raise or sink the level thereof, in order the more conveniently to carry the same over, under or by the side of the railway.

To divert streams, etc.

(i) Make drains or conduits into, through or under any lands adjoining the railway, for the purpose of conveying water from or to the railway.

To make drains or conduits.

(j) Divert or alter the position of any water-pipe, gas-pipe, sewer or drain, or any telegraph, telephone or electric light wire or pole.

To alter position of gas or water pipe, etc.

R. S. N. S., ch. 53, sec. 7 (5), as amended by 58 Vic., ch. 13. Not apply to cities.

(k) Make, complete, alter and keep in repair the railway, with one or more sets of rails or tracks, to be worked by the force and power of steam (or of electricity) (1) or of the atmosphere, or of animals, or by mechanical power, or by any combination of them.

To make and maintain railway.

R. S. O., ch. 170, sec. 9 (b).—(1) Omitted.

R. S. Q., Art. 5132 (6). Same as Ontario.

R. S. M., ch. 130, sec. 12 (c). Same as Ontario.

N. B., 1891, ch. 18, sec. 9 (6). Same as Dominion.

R. S. N. S., ch. 53, sec. 7 (6). Same as Ontario.

(l) Erect and maintain all necessary and convenient buildings, stations, depots, wharves and fixtures, (1) and (construct) (2) purchase and acquire stationary or locomotive engines and carriages, waggons, floats and other machinery, necessary for the accommodation and use of the passengers, freight and business of the railway.

To erect buildings, etc.

R. S. O., ch. 170, sec. 9 (7). (1) "and from time to time to alter, repair or enlarge the same," (2) omitted.

R. S. Q., Art. 5132 (7). Same as Ontario.

R. S. M., ch. 130, sec. 12 (d). Same as Ontario, with additional "and to run boats and vessels propelled by steam or otherwise on any lake, stream or waterway for the purpose of carrying freight or passengers in connection with the said railway."

N. B., 1891, ch. 18, sec. 9 (7). Same as Ontario.

R. S. N. S., ch. 53, sec. 7 (7). Same as Ontario.

(m) Construct or acquire electric telegraph and telephone lines for the purpose of its undertaking.

Telegraph and telephone lines.

N. B., 1891, ch. 18, sec. 9 (14).

R. S. Q., Art. 5176. "Railway companies shall have the right to establish telegraph lines along the whole extent of the railway, at such places along the line, and with offices at such places as shall be determined by the directors, (1) and such telegraphs may be used by the public generally, in conformity with the rules and regulations that the company may adopt."

R. S. N. S., ch. 53, sec. 7 (20). Same as Quebec, excepting (1) "and rates of tariff to be from time to time approved by the Governor in Council."

To make
branch rail-
ways.

(n) Make branch railways, if required and provided for by (this or) (1) the special Act, and manage the same, and for that purpose exercise all the powers, privileges and authorities necessary therefor, in as full and ample a manner as for the railway.

R. S. O., ch. 170, sec. 9 (8).—(1) Omitted.

R. S. Q., Art. 5132 (8).—(1) Omitted.

R. S. M., ch. 130, sec. 12 (e).—(1) Omitted.

N. B., 1891, ch. 18, sec. 9 (8).

R. S. N. S., ch. 53, sec. 7 (8). Same as Ontario.

To convey
persons and
goods.

(o) Take, transport, carry and convey persons and goods (1) on the railway, regulate the time and manner in which the same shall be transported, and the tolls and compensation to be paid therefor, and receive such tolls and compensation.

R. S. O., ch. 170, sec. 9 (10).

R. S. Q., Art. 5132 (10).—(1) "of all kinds."

R. S. M., ch. 130, sec. 12 (g).

N. B., 1891, ch. 18, sec. 9 (10).

R. S. N. S., ch. 53, sec. 7 (10).

To alter
works.

(p) From time to time alter, repair or discontinue the before mentioned works or any of them, and substitute others in their stead.

To do all
things neces-
sary.

(q) Do all other acts necessary for making, maintaining, altering or repairing, and using the railway.

R. S. O., ch. 170, sec. 9 (9). "To construct, erect and make all other matters and things necessary and convenient for the making, extending and using of the railway, in pursuance of and according to the meaning and intent of this Act and of the special Act.

R. S. Q., Art. 5132 (9). Same as Ontario.

R. S. M., ch. 130, sec. 12 (f). Same as Ontario.

N. B., 1891, ch. 18, sec. 9 (9). Same as Ontario.

R. S. N. S., ch. 53, sec. 7 (10).

Powers may
be exercised
in United
States.

(r) (53 *Vir.*, ch. 28, sec. 1.) Any company operating a railway from any point in Canada to any point on the International boundary line may exercise beyond such boundary the powers which it may exercise in Canada, in so far as they are permitted by the laws in force there.

(s) (55-56 *Vic.*, ch. 27, sec. 3, amending 53 *Vic.*, ch. 28, sec. 1.) Any company which has obtained from the Crown, by way of subsidy or otherwise, in respect of the construction or operation of its railway, a right to any land or to an interest in land, has, and from the time of obtaining such right has had, as incident to the exercise of its corporate powers, authority to acquire, sell or otherwise dispose of the same or any part or parts thereof; and such company may convey the same, or any part or parts thereof, to any other company which has entered into any undertaking for the construction or operation, in whole or in part, of the railway in respect of which such land or interest in land was given; and thereafter such other company shall have, in respect of such land or interest in land, the same authority as that of the company which has so conveyed it; and as to any lands given to the company by any corporation or other party, as aid towards, or as consideration in whole or in part for, the construction or operation of the company's railway, either generally or with respect to the adoption of any particular route, or on any other account, the authority of the company and of any other company to which it may convey its right in any of the said lands shall be the same as if such lands had been obtained by the company from the Crown as aforesaid.

91. The company shall restore as nearly as possible to its former state any river, stream, water-course, highway, water-pipe, gas-pipe, sewer or drain, or any telegraph, telephone or electric light wire or pole which it diverts or alters, or it shall put the same in such a state as not materially to impair its usefulness.

R. S. O., ch. 170, sec. 9 (5). "But the stream, water course, highway, canal or railway (a) so intersected or touched, shall be restored by the company to its former state, or to such state as not to impair its usefulness."

R. S. O., Art. 5132 (5). Same as Ontario.

R. S. M., ch. 130, sec. 12 (b). Same as Ontario, excepting (a) "subject to the authority of the Legislature of this Province."

N. B., 1891, ch. 18, sec. 9 (5). Same as Ontario.

R. S. N. S., ch. 53, sec. 7 (5), as amended by 58 *Vic.*, ch. 13. Same as Ontario.

92. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all parties interested for all damage by them sustained by reason of the exercise of such powers.

Declaration
as to powers
with respect
to lands.

Company to
restore
stream, etc.,
to former
state.

Compensation
for damage
done.

R. S. O., ch. 170, sec. 6. "The power given by the special Act, to construct the railway, and to take and use lands for that purpose, shall be exercised subject to the provisions and restrictions contained in this Act."

7.-(1) "For the value of lands taken, and for all damages to lands injuriously affected by the construction of the railway, in the exercise of the powers by this or the special Act, or any Act incorporated therewith, vested in the company, compensation shall be made to the owners and occupiers of, and to all other persons interested in, any lands so taken or injuriously affected;"

(2) "Unless otherwise specially provided by this Act, or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by this Act."

R. S. M., ch. 130, sec. 6. Same as Ontario.

R. S. M., ch. 130, sec. 7. Same as Ontario.

R. S. M., ch. 130, sec. 8. "Unless otherwise specially provided, the clauses of 'The Manitoba Expropriation Act,' respecting the offer of compensation, the notice of intention to arbitrate, the surveyor's certificate accompanying such notices, the appointment, qualifications, powers and duties of arbitrators, the proceedings upon the arbitration, the revocation of notice, the award and its effect, the costs of arbitration, appeals from awards, the payment into Court of the amount of the award, the powers of the Judge and of the Court of Queen's Bench with reference to the award and to the compensation and the distribution of the compensation shall be deemed to be incorporated *mutatis mutandis* with this Act and the special Act so far as not inconsistent therewith; and the amount of such compensation shall be ascertained and determined in the manner provided by 'The Manitoba Expropriation Act;' and the word 'compensation' in such clauses shall be deemed to include 'rent,' where the same may be given as compensation; and the words 'Government' and 'Minister' in said clauses mean 'Company' for the purposes of this Act, save that the power of the Company to take or interfere with the property of others without the consent of the owner is not to be beyond that given by this Act or the special Act, and that this Act, unless otherwise provided by the special Act, determines the time of the vesting in the Company of expropriated property."

N. B., 1891, ch. 18, sec. 7. Same as Ontario, sec. 7 (1).

N. B., 1891, ch. 18, sec. 7 (1) Same as Ontario, sec. 7 (2).

POWER TO BORROW MONEY.

Issue of
bonds, etc.,
authorized.

93. The directors of the company, under the authority of the shareholders to them given at any special general meeting, called for the purpose in the manner provided by section forty-one of this Act, at which meeting shareholders representing at least two-thirds in value of the subscribed stock of the company, and who have paid all calls due thereon, are present in person or represented by proxy, may, subject to the provisions in this Act and the special Act contained, issue bonds, debentures or other securities signed by the president or other presiding officer, and countersigned by the secretary, which counter-signature and the signature to the coupons attached to the same may be en-

graved ; and such bonds, debentures or other securities may be made payable at such times and in such manner, and at such place or places in Canada or elsewhere, and may bear such rate of interest not exceeding six per cent. per annum, as the directors think proper. When they may be made payable.

2. The directors may issue and sell or pledge all or any of the said bonds, debentures, or other securities, at the best price and upon the best terms and conditions which at the time they may be able to obtain, for the purpose of raising money for prosecuting the said undertaking. Disposal of bonds, etc.

3. No such bond, debenture or other security shall be for a less sum than one hundred dollars. Amount of bond, etc.

4. (*As amended by 55-56 Vic., ch. 27, sec. 4*) The power of issuing bonds conferred upon the company hereby or under the special Act shall not be construed as being exhausted by such issue ; but such power may be exercised, from time to time, upon the bonds constituting such issue being withdrawn or paid off and duly cancelled, and the limit to the amount of bonds, debentures or other securities fixed in the special Act shall not be exceeded. Extent of borrowing power.

R. S. O., ch. 170, sec. 9 (11), *repealed by 53 Vic., ch. 45, sec. 1 and replaced by sec. 9, sub-sec. 20, 21, 22, 23, 24.* Sub sec. 20 same as sec. 93, Dominion Act, excepting "eight per cent" for "six," and additional. "But no bonds shall be issued until 20 % of the costs has been actually expended on the work."

R. S. Q., art. 5132 (11) "To borrow from time to time, either in (Canada) (a) or elsewhere, such sums of money as may be expedient for completing, maintaining and working the railway (at a rate of interest not exceeding the legal rate,) (b) and to make the bonds, debentures, or other securities granted for the sums so borrowed, payable either in currency or sterling, and at such place or places within (Canada), (c) or without, as may be deemed advisable, and to sell the same at such prices or discount as may be deemed expedient, or be necessary, and to hypothecate, mortgage, or pledge the lands, tolls, revenues and other property of the company for the due payment of the said sums and the interest thereon (but no debenture shall be for a less sum than \$100)." (d)

R. S. M., ch. 130, sec. 12 (h). Same as Quebec, excepting (a) "this Province"; (b) "and at a rate of interest authorized by the laws of Canada, but not exceeding eight per cent. per annum"; (c) "this province"; (d) omitted.

N. B., 1891, ch. 18, sec. 9 (11). Same as Manitoba, omitting "authorized by the laws of Canada, but," also (d) additional, "provided that the limit to the amount of bonds fixed in the special Act (if any) shall not be exceeded."

R. S. N. S., ch. 53, sec. 7 (11). Same as Quebec, excepting (b) "eight per cent. per annum" and additional "and in all respects such debentures

shall be of such a character and amount as shall be fixed by the Act of the Legislature.

Mortgage deed to secure bonds, etc.

94. The company may secure such bonds, debentures, or other securities, by a mortgage deed creating such mortgages, charges and incumbrances upon the whole of such property, assets, rents and revenues of the company, present or future, or both, as are described in the said deed; but such rents and revenues shall be subject in the first instance to the payment of any penalty imposed for non-compliance with the requirements of this Act respecting returns to be made to the Minister, and next to the payment of the working expenditure of the railway;

Penalties and working expenditure to be a first charge.

Powers which may be granted by deed.

2. By the said deed the company may grant to the holders of such bonds, debentures, or other securities, or the trustees named in such deed, all and every the powers, rights and remedies granted by this Act in respect of the said bonds, debentures, or other securities, and all other powers, rights and remedies not inconsistent with this Act, or may restrict the said holders in the exercise of any power, privilege or remedy granted by this Act, as the case may be; and all the powers, rights and remedies so provided for in such mortgage deed shall be valid and binding, and available to the said holders in manner and form as therein provided;

Validity of deed.

Deposit of deed.

3. Every such mortgage deed shall be deposited in the office of the (Secretary of State of Canada) (2) of which deposit notice shall be given by the company in the (*Canada Gazette*). (3)

As to securing such bonds, etc., by mortgage deed, etc., in Provincial Acts, see notes to sec. 93, *supra*.

Ontario, 53 Vic., ch. 45, sec. 1, adding sub-sec. 21 to sec. 9. R. S. O., ch. 170. Same as Dominion, excepting (2) "office of the Provincial Secretary," (3) "Ontario Gazette."

Bonds, etc., to be a preferential claim on the undertaking.

95. The bonds, debentures, or other securities, hereby authorized to be issued shall be taken and considered to be the first preferential claim and charge upon the company, and the franchise, undertaking, tolls and income, rents and revenues, and real and personal property thereof, at any time acquired, save and except as provided for in the next preceding section;

Holder to be a mortgagee.

2. Each holder of the said bonds, debentures, or other securities shall be deemed to be a mortgagee or incumbrancer upon the said securities *pro rata* with all the other holders; and no

proceedings authorized by law or by this Act shall be taken to enforce payment of the said bonds, debentures, or other securities, or of the interest thereon, except through the trustee or trustees appointed by or under such mortgage deed.

Ontario, 53 Vic., ch. 45, sec. 1, adding sub-sec. 22 to sec. 9. R. S. O., ch. 170. Same as Dominion.

96. If the company makes default in paying the principal or interest on any of the bonds, debentures or other securities, hereby authorized, at the time when the same, by the terms of the bond, debenture, or other security, becomes due and payable, then at the next annual general meeting of the company, and at all subsequent meetings, all holders of bonds, debentures or other securities, so being and remaining in default, shall, in respect thereof, have and possess the same rights and privileges and qualifications for being elected directors and for voting at general meetings as would attach to them as shareholders if they held fully paid-up shares of the company to a corresponding amount; ^{Powers of holders in case of non-payment.}

2. The rights given by this section shall not be exercised by any such holder, unless it is so provided by the mortgage deed, nor unless the bond, debenture or other security, in respect of which he claims to exercise such rights, has been registered in his name, in the same manner as the shares of the company are registered, at least ten days before he attempts to exercise the right of voting thereon; and the company shall be bound on demand to register such bonds, debentures or other securities, and thereafter any transfers thereof, in the same manner as shares or transfers of shares; ^{Rights of holders defined.}

3. The exercise of the rights given by this section shall not take away, limit or restrain any other of the rights or remedies to which the holders of the said bonds, debentures or other securities are entitled under the provisions of such mortgage deed. ^{Certain rights not affected.}

Ontario, 53 Vic., ch. 45, sec. 1, adding sub-sec. 23 to sec. 9. R. S. O., ch. 170. Same as Dominion.

97. All bonds, debentures or other securities hereby authorized may be made payable to bearer, and shall in that case be transferable by delivery, until registration thereof as herein-before provided, and while so registered they shall be transferable by written transfers, registered in the same manner as in the case of the transfer of shares. ^{Transfer of bonds, etc.}

Ontario, 53 Vic., ch. 45, sec. 1, adding sub-sec. 24 to sec. 9. R. S. O., ch. 170. Same as Dominion.

Promissory
notes may be
issued.

No seal re-
quired.

Notes not to
be payable to
bearer.

98. The company may become party to promissory notes and bills of exchange for sums not less than one hundred dollars; and every such note or bill made, drawn, accepted or indorsed by the president or vice-president of the company, or other officer authorized by the by-laws of the company, and countersigned by the secretary, shall be binding on the company; and every such note or bill of exchange so made, drawn, accepted or indorsed shall be presumed to have been made, drawn, accepted or indorsed with proper authority until the contrary is shown; and in no case shall it be necessary to have the seal of the company affixed to such promissory note or bill of exchange, nor shall the president or vice-president or secretary or other officer so authorized be individually responsible for the same, unless such promissory note or bill has been issued without proper authority; but nothing in this section shall be construed to authorize the company to issue any note or bill payable to bearer, or intended to be circulated as money or as the note or bill of a bank.

POWER TO TAKE OR USE LAND AND MATERIALS DEFINED AND
LIMITED.

As to lands
vested in Her
Majesty.

Lands vested
in Her Majesty
for special
purposes.

99. No company (a) shall take possession of, use or occupy any lands (vested in Her Majesty) (1) without the consent of the (2) Governor in Council; but with such consent, any such company may (upon such terms as the Governor in Council prescribes) (3) take and appropriate, for the use of its railway and works, but not alienate, so much of the (4) lands of the (Crown) (5) lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, as also so much of the public beach, or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds, as is necessary for making and completing and using its said railway and works (and whenever any such lands are vested in Her Majesty for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust). (6)

R. S. O., ch. 170, sec. 9 (3)—(1) belonging to the Province," (2) "Lieutenant," (3) omitted, (4) "wild," (5) "Province," (6) omitted.

R. S. Q., Art. 5132 (3). With the consent of the Lieutenant-Governor in Council, to take and appropriate, for the use of its railway and works, but not alienate, so much of the wild lands of the Crown, lying on the route of the railway, as have not been granted or sold, and as may be necessary for such railway, as also so much of the public beach or of the land covered with the waters of any lake, river, stream, canal, or of their respective beds, as is necessary for making and completing and using their said railway and works, subject, however, to the authority and control of the Parliament of Canada, in so far as shipping and navigation are concerned.

R. S. M., ch. 130, sec. 10. Same as Ontario, excepting (a) "heretofore or hereafter authorized to construct a railway," and additional, "subject, however, to the exceptions contained in the following section."

N. B., 1891, ch. 18, sec. 9 (3). Same as Ontario, excepting (4) "unoccupied and unreserved."

R. S. N. S., ch. 53, sec. 7 (3). Same as Dominion, excepting (3) omitted, (4) "wild," (6) substitute "subject, however, to the authority and control of the Parliament of Canada as regards navigation and shipping."

100. Whenever it is necessary for such company to occupy any part of the lands belonging to Her Majesty reserved for naval or military purposes, it shall first apply for and obtain the license and consent of Her Majesty (under the hand and seal of the Governor General), (1) and having obtained such license and consent, it may, at any time or times, enter into and enjoy any of the said lands for the purposes of the railway (but in the case of any such naval or military reserves, no such license or consent shall be given except upon a report first made thereupon by the naval or military authorities in which such lands are for the time being vested, approving of such license and consent being so given). (2)

R. S. M., ch. 130, sec. 11. (1) Substitute "through the proper officers or Department of the Crown or of the Government of Canada," (2) omitted.

101. No company shall take possession of or occupy any portion of any Indian reserve or lands without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor, as in other cases.

102. A company may, for the purpose of obtaining a right of way over or through lands owned or occupied by any other company, and for obtaining the use of the tracks, stations or sta-

As to lands reserved for military or naval purposes.

Consent of proper authority.

As to Indian lands.

As to lands of other companies, etc.

Orders may
be made in
such case.
Certain provi-
sions to apply.

tion grounds of another company, or for the purpose of constructing and operating its railway, take possession of, use or occupy any lands belonging to any other railway company, with the approval of the Railway Committee, which approval such committee may give on any application of which such other company has, in the opinion of the committee, had reasonable notice. On any such application, the Railway Committee may make such orders and give such directions as to it appears just or in the public interest; and all the provisions of the law at any time applicable to the taking of lands and their valuation and the compensation therefor, and appeals from awards thereon, shall apply to such lands.

Extent of land
that may be
taken.

103. The lands which may be taken without the consent of the owner thereof shall not exceed (thirty-three) (1) yards in breadth, but in places where the railway is raised more than five feet higher or cut more than five feet deeper than the surface of the line, or where (offsets) (a) are established, or where stations, depots or fixtures are intended to be erected, or goods to be delivered, the lands, which may be taken without the consent of the (owner), (b) shall not be more than (six hundred and fifty yards in length by one hundred yards in breadth), (2) (except where more ample space for the accommodation of the public, or of the traffic on the railway, or for protection against snow drifts is required—in which cases such greater quantity of land or land covered with water may be taken, as the Minister authorizes). (3)

Exception.

R. S. O., ch. 170, sec. 11.—(1) "thirty," (2) "two hundred yards in length by one hundred and fifty yards in breadth," (b) "person authorized to convey such lands," (3) omitted. See also section 104, *infra*.

R. S. Q., Art. 5164 (1). Same as Dominion, excepting (a) "a double track is," (2) "two hundred and fifty yards in length by one hundred and fifty yards in breadth," (3) omitted. See also section 104, *infra*.

R. S. M., ch. 130, sec. 22. Same as Ontario. See also section 104, *infra*.

N. B., 1891, ch. 18, sec. 11. Same as Ontario. See also sec. 104, *infra*.

R. S. N. S., ch. 53, sec. 9 (1). Same as Dominion, excepting (2) "two hundred and fifty yards in length by seventy-five yards in breadth." See also sec. 104 *infra*.

Extra land to
be shown on
map or plan.

104. The places at which such extra breadth is to be taken shall be shown on the map or plan (1) so far as the same are then ascertained; but the fact of their not being so shown shall not prevent such extra breadth from being taken, if it is taken upon the line shown, or within (one mile thereof, or within such

further distance from such line as is prescribed in the special Act). (2)

R. S. O., ch. 170, sec. 11.—(1) Additional "or plans or sections," (2) substitute "the distance aforesaid from such line."

R. S. Q., Art. 5164 (1). Same as Ontario.

N. B., 1891, ch. 18, sec. 11. Same as Ontario

R. S. N. S., ch. 53, sec. 9 (1). Same as Ontario.

105. The extent of the public beach, or of the land covered with the waters of any river or lake in (Canada), (1) taken for the railway, shall not exceed the quantity (hereinbefore limited).

(2)

R. S. O., ch. 170, sec. 12.—(1) "the Province," (2) "limited in the last preceding clause."

R. S. Q., Art. 5164 (2). Same as Ontario.

R. S. M., ch. 130, sec. 23. Same as Ontario.

N. B., 1891, ch. 18, sec. 12. Same as Ontario.

R. S. N. S., ch. 53, sec. 9 (2). Same as Dominion.

106. Whenever any company (1) requires, at any (2) place on the line of its railway, more ample space for the convenient accommodation of the public or of the traffic on the railway for protection against snow drifts) (3) than it then possesses or can take without the consent of the owners thereof, the company may cause (a map or plan and book of reference) (4) to be made of the additional lands required at such (5) place for the purposes aforesaid. (6)

R. S. O., ch. 170, sec. 47.—(1) "incorporated by, or subject to the authority of the Legislature of Ontario," (2) "station or," (3) omitted, (4) "a plan," (5) "station or," (6) "not being in actual use for similar purposes by any other railway company;" and see secs. 107, 108, *infra*.

R. S. Q., Art. 5165. Same as Ontario, and see secs. 107, 108, *infra*.

R. S. N. S., ch. 53, sec. 10. Same as Ontario *mutatis mutandis*; and see secs. 107 and 108 *infra*.

107. The company may transmit the map or plan and the book of reference to the Minister with an application, on behalf of the company, supported by affidavit, referring to such map or plan and book of reference, and stating that certain lands shown therein are necessary for such purposes, and that no other land suitable for such purposes can be acquired at such place on reasonable terms and with less injury to private rights, and requesting the Minister to authorize the taking thereof for such purposes under this Act.

R. S. O., ch. 170, sec. 47, "(and for the purpose of making such plan shall have the powers granted to railway companies for making surveys by

(section 9 of this Act) (a), and may transmit the plan to the Commissioner of Public Works, with an application (supported by affidavit) on behalf of the company, referring to the plan, and stating that certain ground shown thereon is necessary for the purposes aforesaid, and that no other ground suitable for the purpose can be acquired at such place on reasonable terms, and with less injury to private rights, and requesting the commissioners to authorize the taking thereof for such purposes under this Act."

R. S. Q., Art. 5165. Same as Ontario, excepting (a) "article 5132."

R. S. N. S., ch. 53, sec. 10. Same as Ontario, excepting (a) "seventh section of this chapter."

Notice to owner and certificate to be transmitted to Minister.

108. At least ten days' notice of such application shall be given to the owner (or possessor) (a) of such property; and the correctness of the (map or plan and book of reference) (1) and the truth of the allegations in such application shall be certified by the president or one of the directors of the company, and by its engineer, and such (map or plan and book of reference) (2) and statement shall be made and transmitted to the Minister in duplicate.

R. S. O., ch. 170, sec. 47.—(1) "Plan," (2) "plan."

R. S. Q., Art. 5165. (a) Omitted, (1) "plan," (2) "plan."

R. S. N. S., ch. 53, sec. 10. Same as Ontario.

Minister may grant the application after inquiry.

109. The Minister (1) shall inquire into the correctness of the (map or plan and book of reference) (2) and the truth of the allegations of such application, and, if he is satisfied thereof, shall grant a certificate to that effect, and declaring it to be necessary in the public interest that the land shown on such (map or plan and book of reference) (3) or any less quantity, should be acquired by the company; and such certificate shall be annexed to one of the duplicates of the said (map or plan and book of reference) (4) and statement, and the other duplicate shall remain at the (department). (5)

R. S. O., ch. 170, sec. 48.—(1) "Commissioner of Public Works," (2) "plan," (3) "plan," (4) "plan," (5) "office of the Commissioner." (a)

R. S. Q., Art. 5166. Same as Ontario, excepting (a) "of Public Works."

R. S. N. S., ch. 53, sec. 11. Same as Ontario.

Deposit of copy of plan, etc.

110. A copy of the duplicate of such map or plan and book of reference and statement and of such certificate shall be deposited in the office of the registrar of deeds for the county or district in which the lands lie.

Powers of company on the granting of certificate.

111. Upon the granting of such certificate, and by virtue thereof, the company may, without the consent of the owners, take the land shown on such (map or plan and book of refer-

ence) (1) as required for such purposes ; and the company, and all persons who could not otherwise convey the same to the company, shall have, with respect to any such land, all the powers granted by (2) this Act to companies (3) and persons who could not otherwise convey the same, with respect to lands which may be taken without the consent of the owners thereof ; (and all the provisions of law at any time applicable to the taking of land by the company and its valuation and the compensation therefor shall apply to the lands mentioned in such certificate). (4)

R. S. O., ch. 170, sec. 49.—(1) "plan," (2) "sections 13 to 20 inclusive of," (3) additional, "corporations," (4) substitute "and the enactments and provisions of the said sections, except such as refer to the map or plan and book of reference therein mentioned, or as limit the extent of land to be taken, shall apply and are hereby extended to the ground mentioned in the certificate of the Commissioner of Public Works, and to all the proceedings connected with or consequent upon the acquiring or taking of such ground or any part thereof, with or without the consent of the proprietors ; and if at any time thereafter the company do not require the whole or any portion of the land acquired under this Act for railway purposes, then such land as is not so required shall be sold by auction after thirty days' notice thereof in any (local) (a) newspaper."

R. S. Q., Art. 5167. Same as Ontario, excepting (2) "subsection 13 of this section," (a) omitted.

R. S. N. S., ch. 53, sec. 12. Same as Ontario, excepting (2) "the sections of this chapter headed 'Lands and their valuation,'" (a) newspaper published nearest to the lands."

112. The company, either for the purpose of constructing or repairing its railway, or for the purpose of carrying out the requirements of the Railway Committee, or in the exercise of the powers conferred upon it by the Railway Committee, may enter upon any land which is not more than two hundred yards distant from the centre of the located line of the railway, and may occupy the said land as long as is necessary for the purposes aforesaid ; and all the provisions of law at any time applicable to the taking of land by the company, and its valuation, and the compensation therefor, shall apply to the case of any land so required ; but before entering upon any land for the purposes aforesaid, the company shall, in case the consent of the owner is not obtained, pay into the office of one of the superior courts for the Province in which the land is situated, such sum, with interest thereon for six months, as is, after two clear days' notice to the owner of the land, or to the person empowered to

Lands may be
acquired for
constructing
or repairing
such case.

convey the same, or interested therein, fixed by a judge of any one of such superior courts.

Power to take materials for construction.

113. Whenever stone, gravel, earth, sand or water is required for the construction or maintenance of any railway or any part thereof, the company may, if it cannot agree with the owner of the land on which the same are situated, for the purchase thereof, cause a land surveyor, duly licensed to act as such (in the Province, district or county, or an engineer) (a) to make a map and description of the property so required, and it shall serve a copy thereof, with its notice of arbitration as in the case of acquiring the roadway; and all the provisions of this Act (respecting expropriation of lands) (1) shall apply to the subject matter of this section, and to obtaining materials as aforesaid; and such proceedings may be had by the company, either for the right to the fee simple in the land from which the material is taken, or for the right to take material for any time it thinks necessary,—and the notice of arbitration, if arbitration is resorted to, shall state the interest and powers required.

Notice in case of arbitration.

R. S. Q., Art. 5164 (34).—(1) “as to the service of the said notice of arbitration, compensation, deeds of sale, payment of money into Court, the right to sell, and the right to convey, and the persons from whom lands may be taken, or who may sell.”

R. S. N. S., ch. 53, sec. 9 (33). Same as Ontario, excepting (a) omitted.

Power to make sidings, conduits, etc.

114. Whenever any stone, gravel, earth, sand or water is so taken at a distance from the line of the railway, the company may lay down the necessary sidings, water pipes or conduits and tracks, over or through any lands intervening between the railway and the land on which such material or water is found, whatever is the distance, and all the provisions of this Act, except such as relate to the filing of plans and publication of notice, shall apply, and the powers thereby granted may be used and exercised to obtain the right of way from the railway to the land on which such materials are situated; and such right may be acquired for a term of years, or permanently, as the company thinks proper; and the powers in this and the next preceding section contained may, at all times, be exercised and used in all respects, after the railway is constructed, for the purpose of repairing and maintaining the railway.

Maintenance and repair of railway.

R. S. Q., Art. 5164 (35).

R. S. N. S., ch. 53, sec. 9 (34).

115. Whenever, for the purpose of procuring sufficient land for stations or gravel pits, or for constructing, maintaining and using the railway, any land may be taken under the compulsory provisions of this Act, and by purchasing the whole of any lot or parcel of land over which the railway is to run, or of which any part may be taken under the said provisions, the company can obtain the same at a more reasonable price or to greater advantage than by purchasing the roadway line only, or only such part as aforesaid, the company may purchase, hold, use or enjoy the whole of such lot or parcel, and also the right of way thereto, if the same is separated from its railway, and may sell and convey the same, or any part thereof, from time to time, as it deems expedient; but the compulsory provisions of this Act shall not apply to the taking of any portion of such lot or parcel necessary for the purposes aforesaid. ^{If the whole parcel of land can be purchased with advantage.} ^{Compulsory provisions not to apply.}

R. S. Q., Art. 5164 (36).

R. S. N. S., ch. 53, sec. 9 (35).

116. Every company (1) may, on and after the first day of November, in each year, enter into and upon any lands of Her Majesty, or into and upon the lands of any (2) person whomsoever, lying along the route or line of its railway, and may erect and maintain snow fences thereon, subject to the payment of such land damages, if any, as are thereafter established, in the manner provided by law with respect to such railway, to have been actually suffered; but every snow fence so erected shall be removed on or before the first day of April then next following. ^{Erection of snow fences,} ^{And removal thereof.}

R. S. N. S., ch. 53, sec. 16 (7). Same as Quebec, excepting (2) additional "subject to the jurisdiction of the Parliament of Canada" and substitute "Government of Canada" for "Government of this Province."

R. S. Q., Art. 5171 (7).—(1) "heretofore incorporated, or which hereafter may be incorporated, as well as the Government of this Province, with respect to all railways constructed by or being the property or under the control of the Province," (2) "corporation or."

POWERS RESPECTING LOCATION OF LINE, DEVIATIONS AND CHANGES DEFINED AND LIMITED.

117. No lateral deviation of more than one mile shall be made from the located line of the railway or from the places assigned thereto in the map or plan and book of reference, or profiles, except in such instances as are provided for in the special Act. ^{What deviation shall be allowed.}

R. S. O., ch. 170, sec. 10 (11). "No deviation of more than one mile from the line of the railway or from the places assigned thereto in the said map or plan and book of reference, or plans or sections, shall be made into, through, across, under or over any part of the lands not shown in such map or plan and book of reference, or plans or sections, or within one mile of the said line and place, save in such instances as are provided for in the special Act."

R. S. Q., Art. 5163 (11). Same as Ontario.

N. B., 1891, ch. 18, sec. 10 (11). Same as Ontario.

R. S. N. S., ch. 53, sec. 8 (11). Same as Ontario.

As to error in
name entered
in book.

118. The railway may be (made) (1) carried (or placed) (2) across or upon the lands of any person on the located line, or within the distance from such line as aforesaid, although the name of such person has not been entered in the book of reference, through error or any other cause, or although some other person is erroneously mentioned as the owner of or entitled to convey, or is interested in such lands.

R. S. O., ch. 170, sec. 10 (12), sec. 9 (4). (1) Omitted, (2) omitted.

R. S. Q., Art. 5163 (12), Art. 5132 (4). Same as Ontario.

N. B., 1891, ch. 18, sec. 10 (12), sec. 9 (4). Same as Ontario.

R. S. N. S., ch. 53, sec. 8 (12). Same as Ontario.

Mines to be
protected.

119. No company shall, without the authority of the Railway Committee, locate the line of its proposed railway, or of any branch thereof, so as to obstruct or interfere with or injuriously affect the working of, or the access or adit to any mine then open, or for opening which preparations are, at the time of such location, being lawfully and openly made.

R. S. O., ch. 170, sec. 21. The company shall not be entitled to any mines of iron, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

22. If the owner, lessee, or occupier of any mines or minerals lying under the railway or any of the works connected therewith or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of the notice it shall be lawful for the company to cause the mines to be inspected by any person appointed by them for the purpose, and if the company shew to the satisfaction of the Commissioner of Public Works that the working of the mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for the mines or any part thereof to the owner, lessee or occupier thereof, then he shall not work or get the same; and if the company and the owner, lessee or occupier do not agree as to the amount of the compensation, the same shall be settled as in other cases of disputed compensation under this Act.

23. If before the expiration of such thirty days the company do not state their willingness to treat with the owner, lessee or occupier for the payment of the compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate; and if any damage or obstruction be occasioned to the railway or works by improper working of the mines, the same shall be forthwith repaired or removed, as the case may require, and the damage made good by the owner, lessee or occupier of the mines or minerals, and at his own expense; and if the repair or removal be not forthwith done, or if the company shall so think fit without waiting for the same to be done by the owner, lessee or occupier, it shall be lawful for the company to execute the same and recover from the owner, lessee or occupier the expense occasioned thereby by action in any Court of competent jurisdiction.

24. If the working of such mines under the railway, or works, or within the above mentioned distance therefrom, be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees and occupiers of such mines, and whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata, the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work their said mines; but no such airway, headway, gateway, or water level shall be cut or made without first procuring the consent in writing of the Commissioner of Public Works of the Province; nor shall the same be cut or made upon any part of the railway or works, or so as to injure the same, or to impede the passage thereon.

25. The company shall, from time to time, pay to the owner, lessee, or occupier of any such mines extending so as to lie on both sides of the railway all such additional expenses and losses as shall be incurred by the owner, lessee or occupier, by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway; and if any dispute or question shall arise between the company and such owner, lessee, or occupier as aforesaid, touching the amount of such losses or expenses, the same shall be settled by arbitration under this Act.

26. For better ascertaining whether any such mines are being worked, or have been worked, so as to damage the railway or works, it shall be lawful for the company, after giving twenty-four hours' notice in writing, to enter upon any lands through or near which the railway passes wherein any such mines are being worked, or are so supposed to be, and to enter into and return from any such mines or the works connected therewith; and for that purpose it shall be lawful for them to make use of any apparatus or machinery belonging to the owner, lessee or occupier of such mines, and to use all necessary means for discovering the distance from the railway to the parts of such mines which are being worked, or about so to be.

27. If the owner, lessee or occupier of any such mine shall refuse to allow any person appointed by the company for that purpose to enter into and inspect any such mines or works in manner aforesaid, every person so offending shall, for every such refusal, forfeit to the company a sum not exceeding \$100.

28. If it appear that any such mines have been worked contrary to the provisions of the preceding seven sections, the company may, if they think fit, give notice to the owner, lessee or occupier thereof to construct such works, and to adopt such means as may be necessary or proper for making safe the railway and preventing injury thereto; and if after such notice such owner, lessee or occupier do not forthwith proceed to construct the works necessary for making safe the railway, the company may themselves construct such works and recover the expenses thereof from the owner, lessee or occupier by action in any Court of competent jurisdiction.

Change in
line of railway
may be made.

120. Any company, (a) which desires at any time to change the location of its line of railway in any particular part, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting such line of railway, or for any other purpose of public advantage, may (with the approval of the Railway Committee) (1) make such change; and all the provisions of this Act shall refer as fully to the part of such line of railway so at any time changed or proposed to be changed, as to the original line; but no company shall extend its line of railway beyond the termini mentioned in the special Act.

R. S. O., ch. 170, sec. 9 (19).—(1) Omitted.

R. S. Q., Art. 5132 (18). Same as Ontario.

R. S. M., ch. 130, sec. 14.—(a) "Heretofore or hereafter incorporated,"

(1) omitted.

N. B., 1891, ch. 18, sec. 9 (18). Same as Ontario.

R. S. N. S., ch. 53, sec. 7 (18). Same as Ontario.

POWER TO CONSTRUCT BRANCH LINES DEFINED AND LIMITED.

Power to con-
struct branch
lines for
certain pur-
poses.

121. Any company may, for the purpose of connecting any city, town, village, manufactory or mine, or any quarry of stone or slate, or any well or spring, with the main line of the railway of the company, or with any branch thereof, or with any railway worked or leased by the company, or for the purpose of giving increased facilities to business, or for the purpose of transporting the products of any such manufactory, mine, quarry, well or spring, build, make and construct, and work and use, sidings, switches or branch lines of railway, not exceeding in any one case six miles in length; but such company shall not proceed to locate or build any branch line of more than one-quarter of a mile in length, under this section, until public notice has been given, for six weeks, in some newspaper published in the (county or) (1) counties through or in which such branch line is to be made, that it is the intention of the company to apply to the (Railway Committee) (2) to sanction the building of such branch

Notice to be
given.

line, and the appropriation of the necessary lands for that purpose, under the compulsory powers vested in such company by this Act, or by any other Act in its behalf; nor unless the company has, prior to the first publication of such notice, deposited in the registry office of any city, county or part of a county, in which the line or any part thereof is to be constructed, a map or plan and book of reference indicating the location of the line; nor until the company has submitted the same to, and such map or plan and book of reference have been approved of by the (Railway Committee), (3) after the expiration of the said notice; and the order of the (Railway Committee) (4) approving such map or plan and book of reference shall limit the time, which shall not exceed two years from the date of such order, within which the company may construct such branch line.

R. S. Q., Art. 5132, sec. 17. (1) Omitted, (2) "Lieutenant-Governor in Council," (3) "Lieutenant-Governor in Council," (4) "Lieutenant-Governor in Council."

R. S. O., ch. 170, sec. 9 (18). "Any company (a) may construct a branch or branches not exceeding (six) (b) miles in length, from any terminus or station of the railway of such company, whenever a by-law sanctioning the same has been passed by the municipal council of the municipality within the limits of which the proposed branch is situate (and no such branch shall, as to the quality and construction of the road, be subject to any of the restrictions contained in the special Act of incorporation of the company or in this Act, nor shall anything in either of the said Acts authorize any company to take for such branch any lands belonging to any party without the consent of such party first obtained)." (c)

R. S. M., ch. 130, sec. 13. Same as Ontario, excepting (a) additional "heretofore or hereafter incorporated," (b) "ten," (c) substitute "and for the purpose of building said branch the company shall have the same rights, powers and authorities as if the same were part of the main line."

N. B., 1891, ch. 18, sec. 9 (8). "To make branch railways, if required, and provided by the special Act, and to manage the same, and for that purpose to exercise all the powers, privileges and authorities necessary therefor, in as full and ample a manner as for the railway."

R. S. N. S., ch. 53, sec. 7 (17). Same as Dominion, excepting after (1) additional "and if no newspaper is published in such county or counties, then in the nearest newspaper" (2) (3) (4) "Governor in-Council."

122. Every such company may, for any such purpose, exercise all the powers given to it with respect to its main line under this and the special Act; and each and every provision of such Acts which is applicable to such extension shall extend and apply to every such siding, switch or branch line of railway.

R. S. Q., Art. 5132 (17).

R. S. N. S., ch. 53, sec. 7 (17).

PLANS AND SURVEYS.

Surveys and levels.

Map or plan and book of reference.

123. (1) Surveys and levels shall be made and taken of the lands through which the railway is to pass, together with a map or plan and profile thereof, and of its course and direction, and of the lands intended to be passed over and taken thereof, as far as then ascertained; and a book of reference for the railway shall also be made, in which shall be set forth:—

(a) A general description of the said lands;

(b) The names of the owners and occupiers thereof, as far as they can be ascertained; and—

(c) Everything necessary for the right understanding of such map or plan (and profile). (2)

R. S. O., ch. 170, sec. 10 (1).—(1) Additional, “Plans and surveys shall be made and corrected as follows,” (2) omitted.

R. S. Q., art. 5163 (1).

R. S. N. S., ch. 53, sec. 8 (1). Same as Ontario, excepting (2) “as may be required by the Governor-in-Council.”

May be in sections, and to be deposited.

124. The map or plan and book of reference and profile may be made of sections of the railway, and shall be deposited at the department.

To be examined and certified and copies deposited.

125. The map or plan and book of reference and profile shall be examined and certified by the Minister or by the deputy, and a duplicate thereof so examined and certified shall be deposited at the department, and the company shall (deposit) (1) copies of such map or plan and book of reference and profile, or of such parts thereof as relate to each (district or) (2) county through which the railway is to pass, in the offices of the registrars of deeds for such (districts or) (2) counties respectively.

R. S. O., ch. 170, sec. 10 (2). “A map or plan and book of reference shall be examined and certified by the (Commissioner of Crown Lands or his Deputies), (a) who shall deposit copies thereof, in the offices of the clerks of the peace in the (districts or) (b) counties through which the railway passes, and also in the office of the (Provincial Secretary), (c) and shall also deliver one copy thereof to the company.”

R. S. Q., Art. 5163 (2). Same as Dominion, excepting (1) “furnish,” (2) omitted.

N. B., 1891, ch. 18, sec. 10 (2). Same as Ontario, excepting (a) “Chief Commissioner of Public Works,” (b) omitted, (c) “Chief Commissioner of Public Works.”

R. S. N. S., ch. 53, sec. 8 (2). Same as Dominion, excepting “Commissioner of Public Works or his deputy,” also “office of the clerk of the municipalities.”

R. S. M., ch. 130, sec. 15. "The Company shall deposit with the district registrar of each land titles district, through or in which its railway is intended to be built, plans of the right of way and station grounds of or appurtenant to the railway, so far as the same may be in such district, and showing the area taken from each quarter section, parish lot or other parcel of land, which plans must be certified as required by "The Real Property Act."

126. Any person may resort to such copies, and make ex-Access to
tracts therefrom or copies thereof, as occasion requires, paying copies.
to the (registrar of deeds) (1) at the rate of ten cents for every
hundred words. (2)

R. S. O., ch. 170, sec. 10 (3). (1) "Provincial Secretary or Clerks of the Peace." (2) additional, "Any person feeling aggrieved by the proposed location of the line of railway may, within (ten) (a) days after the deposit of the map or plan and book of reference aforesaid in the office of the Clerk of the Peace of the (district or) (b) county where the lands are situated, the location through which is complained of, apply to the Lieutenant-Governor in Council, setting forth his objections to the location of the proposed line, and the Lieutenant-Governor in Council shall, if he considers sufficient cause therefor exists, appoint a disinterested engineer, who shall examine the said proposed line, and after hearing the parties, he shall confirm or alter the same as may be consistent with the just rights of all parties and of the public. The determination of the engineer approved by the Lieutenant-Governor in Council shall, within (ten) (c) days after his appointment, be made and certified, and such certificate shall be filed in the office of the Clerk of the Peace for the (district or) (d) county where the lands are situated."

(a) "The said engineer shall be entitled to reasonable fees for each day employed in connection with the said examination and work, together with his actual expenses incurred therein, and the amount shall in the first instance be paid by the person applying for his appointment; but if the proposed route is altered or changed by the engineer, the railway company shall refund to the applicant the amount so paid."

R. S. Q., Art. 5163 (3). Same as Dominion.

N. B., 1891, ch. 18, sec. 10 (3). Same as Ontario, excepting (a) "Thirty," (b) omitted, (c) "Fourteen," (d) omitted.

R. S. N. S., ch. 53, sec. 8 (4). Same as Dominion, excepting (1) "clerks of the municipalities."

127. Such map or plan and book of reference and profile so Certified
certified, or a true copy thereof (or an extract therefrom) (1) cert- copies to be
tified by the (Minister or his deputy), (2) or by any registrar of evidence.
deeds, shall be evidence in any court of justice or elsewhere.

R. S. O., ch. 170, sec. 10 (4). "The triplicates of the map or plan and book of reference so certified, or a true copy thereof certified by the (Provincial Secretary), (a) or by the Clerks of the Peace, shall be good evidence in any Court of Justice or elsewhere."

R. S. Q., Art. 5163 (4). Same as Dominion, excepting (1) omitted, (2) "Commissioner of Public Works."

N. B., 1891, ch. 18, sec. 10 (4). Same as Ontario, excepting (a) "Chief Commissioner."

R. S. N. S., ch. 53, sec. 8 (4). Same as Quebec, except "clerks of the municipalities" instead of "registrar of deeds"

Errors, how
remedied.

128. Any omission, mis-statement or erroneous description of such lands, or of the owners or occupiers thereof, in any map or plan or book of reference, may, after ten days' notice has been given to the owners (1) of such lands, (2) be corrected by two justices, on application made to them for that purpose; and if it appears to them that such omission, mis-statement or erroneous description arose from mistake, the justices shall certify the same accordingly.

R. S. O., ch. 170, sec. 10 (5).

R. S. Q., Art. 5163 (5).

N. B., 1891, ch. 18, sec. 10 (5).

R. S. N. S., ch. 53, sec. 8 (5) as amended by 51 Vic., ch. 29. Same as Dominion excepting (1) "or persons named or represented on or in said plan, map or book of reference as the owners," (2) "or after notice given by publication in at least three successive issues in a newspaper published in the county where such lands lie."

Certificate re-
lating there-
to.

129. The certificate shall state the particulars of any such omission, and the manner thereof, and shall be deposited with the (registrars of deeds) (1) of the (districts or) (a) counties, respectively, in which such lands are situate, and shall be kept by them together with the other documents to which it relates, and thereupon such map or plan, or book of reference, shall be deemed to be corrected according to such certificate; and the company may make the railway in accordance with the certificate.

R. S. O., ch. 170, sec. 10 (6).—(1) "Clerks of the Peace."

R. S. Q., Art. 5163 (6).—(a) Omitted.

N. B., 1891, ch. 18, sec. 10 (6).—(1) "Clerks of the Peace," (a) omitted.

R. S. N. S., ch. 53, sec. 8 (6). Same as Dominion, excepting (1) "clerks of the municipality."

Alterations
from original
survey.

130. If any alterations from the original plan or survey are intended to be made in the line or course of the railway, a (map or plan and profile) (1) of such alterations (2) on the same scale and containing the same particulars as the original (map or plan and profile) (3) shall be deposited in the same manner as the original map or plan (and profile) (4), and copies of or extracts from such (map or plan and profile) (5), so far as they relate to the several districts or counties in or through which such alterations are (intended) (6) to be made, shall be deposited with the (registrars of deeds) (7) of such districts and counties.

R. S. O., ch. 170, sec. 10 (7).—(1) Substitute "plan and section in triplicate," (2) "as have been approved by the Legislature," (3) "plan and sur-

vey," (4) omitted, (5) "plan or section," (6) "authorized," (7) "Clerks of the Peace."

R. S. Q., Art. 5163 (7). Same as Ontario, excepting (1) omitting "triplicate."

N. B., 1891, ch. 18, sec. 10 (7). Same as Ontario, excepting (2) "Governor in Council."

R. S. N. S., ch. 53, sec. 8 (7). Same as Ontario, excepting (1) omitting "triplicate," (2) "Governor-in-Council," (7) "clerks of the municipalities."

131. Until such original map or plan and book of reference (and profile) (1) or the (map) (2) or plan and profile of the alterations have been so deposited, the construction of the railway, or of the part thereof affected by the alterations, as the case may be, shall not be proceeded with.

R. S. O., ch. 170, sec. 10 (8).—(1) Omitted, (2) omitted.

R. S. Q., Art. 5163 (8). Same as Ontario.

N. B., 1891, ch. 18, sec. 10 (8).

R. S. N. S., ch. 53, sec. 8 (8). Same as Ontario.

132. The (registrars of deeds) (1) shall receive and retain the copies of the original (maps or plans and books of reference and profiles) (2) and copies of the (maps) (3) or plans and profiles of alterations, and extracts thereof respectively, and shall permit all persons interested to inspect any of the documents aforesaid, and to make copies of and extracts from the same; and every registrar of deeds who refuses so to do is liable, on summary conviction, for each offence to a penalty of four dollars.

R. S. O., ch. 170, sec. 10 (9).—(1) "Clerks of the Peace," (2) "plans and surveys," (3) omitted.

R. S. Q., Art. 5163 (9). Same as Dominion Act, excepting (2) and (3) same as Ontario.

N. B., 1891, ch. 18, sec. 10 (9). Same as Ontario, excepting penalty, which is \$50.

R. S. N. S., ch. 53, sec. 8 (9). Same as Ontario, excepting (1) "clerks of the municipality."

133. The copies of the maps or plans and books of reference (and profiles) (1) or of any alterations or corrections thereof, or extracts therefrom, certified by the (registrar of deeds) (2) shall be received in all courts of justice and elsewhere as evidence of the contents thereof, and the (registrar of deeds) (3) shall, when required so to do, give such certificate to any person interested.

(4)
R. S. O., ch. 170, sec. 10 (10).—(1) Omitted, (2) "Clerk of the Peace," (3) "Clerk of the Peace," (4) "when required."

R. S. Q., Art. 5163 (10). Same as Dominion, excepting (1) omitted, (4) "when required."

N. B., 1891, ch. 18, sec. 10 (10). Same as Ontario.

R. S. N. S., ch. 53, sec. 8 (10). Same as Ontario, excepting (2) (3) "clerk of the municipality."

Map of the completed railway to be filed at the department.

134. A map (or plan) (1) and profile of the completed railway and of the land taken or obtained for the use thereof, shall, within (six months) (2) after completion of the undertaking, be made and filed at the (department), (3) and maps or plans of the parts thereof, located in different (districts and) (4) counties shall be filed in the registry offices for the (districts and counties) (5) in which such parts are respectively situate (and every company which fails or neglects to file such maps or plans and profiles at the department, or to file such maps or plans in such registry offices within the said period, shall incur a penalty of two hundred dollars, and a like penalty for each and every month during which such failure or neglect continues). (6)

Penalty for neglect.

R. S. O., ch. 170, sec. 10 (13).—(1) Omitted, (2) "a reasonable time," (3) "office of the Commissioner of Public Works," (4) omitted, (5) "registry divisions," (6) no provision for penalty.

R. S. Q., Art. 5163 (13).—(1) Omitted, (3) "Department of Public Works," (4) omitted.

N. B., 1891, ch. 18, sec. 10 (13). Same as Ontario, excepting (4) omitted, (5) "counties."

R. S. N. S., ch. 53, sec. 8 (13). Same as Dominion, excepting (3) "office of the Commissioner of Public Works."

Scale and paper.

135. Every map (or plan and profile) (1) shall be drawn on such a scale and on such paper as are, from time to time, designated for that purpose by the (Minister), (2) and shall be certified and signed by the president or engineer of the company.

R. S. O., ch. 170, sec. 10 (14).—(1) Omitted, (2) "Commissioner of Public Works."

R. S. Q., Art. 5163 (14). Same as Ontario.

N. B., 1891, ch. 18, sec. 10 (14). Same as Ontario.

R. S. N. S., ch. 53, sec. 8 (14). Same as Ontario.

LANDS AND THEIR VALUATION.

Conveyance to the company.

136. All (1) tenants in tail or for life (*grevés de substitution*), (2) guardians (curators), (3) executors, administrators (trustees, and all persons whomsoever), (4) not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes-covert*, or other persons, seized, possessed

of, or interested in any lands, may contract and sell and convey to the company all or any part thereof.

R. S. O., ch. 170, sec. 13 (1).—(1) Add "corporations and persons whatsoever," (2) omitted, (3) omitted, (4) "and all other trustees whatsoever."

R. S. Q., Art. 5164 (3). Same as Ontario, substituting "usufructuaries Institutes" for "tenants in tail or for life," and "tutors" for "guardians," also adding "curators."

N. B., 1891, ch. 18, sec. 13. Same as Ontario, omitting "in tail."

R. S. M., ch. 130, sec. 17. Same as Ontario, with the addition of "curators."

R. S. N. S., ch. 53, sec. 9 (3). Same as N. B., adding "curators."

137. In all cases in which such persons have no right in law to sell or convey the rights of property of the said land, such persons shall obtain from a judge, (1) after due notice to the persons interested, the right to sell the said land; and the said judge shall give such orders as are necessary to secure the investment of the purchase money in such a manner as he deems necessary, in accordance with the law of the Province, to secure the interests of the owner of the said land.

Order of judge required in certain cases.

R. S. O., ch. 170, sec. 18. "Where more persons than one are proprietors of any land as joint tenants or tenants in common, any contract or agreement made in good faith with any person being proprietor or with any person being together proprietors of one-third or more of such land, as to the amount of compensation for the same, or for any damages thereto, shall be binding as between the remaining proprietor or proprietors as joint tenants, or tenants in common; and the proprietor or proprietors who have so agreed may deliver possession of such land, or empower the entry upon the same, as the case may be."

R. S. Q., Art. 5164 (3). Same as Dominion, excepting (1) "of the Superior Court."

R. S. M., ch. 130, sec. 20. Same as Ontario.

R. S. N. S., ch. 53, sec. 9 (3). Same as Dominion, excepting "competent" before "Judge."

138. The powers (herein) (1) conferred upon rectors in possession of glebe lands (in the Province of Ontario), (2) ecclesiastical and other corporations, trustees of land for church or school purposes, (3) executors appointed by wills under which they are not invested with any power over the real property of the testator, administrators of persons dying intestate, but at their death seized of real property, shall only extend and be exercised with respect to any of such lands actually required for the use and occupation of a company.

Limitation of powers in certain cases.

R. S. O., ch. 170, sec. 13 (2).—(1) "by the preceding section," (2) omitted, (3) "or either."

R. S. Q., Art. 5164 (4). Same as Ontario, omitting "Rectors in possession of glebe lands."

R. S. M., ch. 130, sec. 17. Same as Dominion, excepting (2) omitted,
 (3) "or either."
 N. B., 1891, ch. 18, sec. 13 (2). Same as Ontario.
 R. S. N. S., ch. 53, sec. 9 (4). Same as Ontario.

Effect of sale
 under preced-
 ing sections.

139. Any contract, agreement, sale, conveyance and as-
 surance so made hereunder shall be valid and effectual in law,
 to all intents and purposes whatsoever, and shall vest in the
 company receiving the same, the fee simple in the lands in such
 deed described, freed and discharged from all trusts, restrictions
 and limitations whatsoever; and the person (1) so conveying is
 hereby indemnified for what he (2) does by virtue of or in
 pursuance of this Act.

Seller indem-
 nified.

R. S. O., ch. 170, sec. 14.—(1) "or corporation." (2) "or it."
 R. S. Q., Art. 5164 (5). Same as Ontario.
 R. S. M., ch. 130, sec. 18. Same as Ontario.
 N. B., 1891, ch. 18, sec. 15. Same as Ontario.
 R. S. N. S., ch. 53, sec. 9 (5). Same as Ontario.

Responsabili-
 ty as to pur-
 chase money.

140. The company shall not be responsible for the disposi-
 tion of any purchase money for lands taken by it for its pur-
 poses, if paid to the owner of the land or into court for his
 benefit. (1)

R. S. O., ch. 170, sec. 15.—(1) "as hereinafter provided."
 R. S. Q., Art. 5164 (6). Same as Ontario.
 R. S. M., ch. 130, sec. 18. Same as Dominion, excepting (1) "as pro-
 vided by the Manitoba Expropriation Act."
 N. B., 1891, ch. 18, sec. 15. Same as Ontario.
 R. S. N. S., ch. 53, sec. 9 (6). Same as Ontario.

Effect of con-
 tracts made
 before deposit
 of map, etc.

141. Any contract or agreement made by any person
 authorized by this Act to convey lands, and made before the
 deposit of the map or plan and book of reference, and before
 the setting out and ascertaining of the lands required for the
 railway, shall be binding at the price agreed upon for the same
 lands, if they are afterwards so set out and ascertained with-
 in one year from the date of the contract or agreement, and
 although such land has, in the meantime, become the property
 of a third person; and possession of the land may be taken and
 the agreement and price may be dealt with as if such price had
 been fixed by an award of arbitrators, as hereinafter provided,
 and the agreement shall be in the place of an award.

R. S. O., ch. 170, sec. 16.
 R. S. Q., Art. 5164 (7).
 N. B., 1891, ch. 18, sec. 16.
 R. S. N. S., ch. 53, sec. 9 (7).

142. All (1) persons who cannot, in common course of law, sell or alienate any lands so set out and ascertained, shall agree upon a fixed annual rent as an equivalent, and not upon a principal sum, to be paid for the lands; and if the amount of the rent is not fixed by voluntary agreement or compromise, it shall be fixed, and all proceedings shall be regulated in the manner herein prescribed. (2)

R. S. O., ch. 170, sec. 17.—(1) "corporations or."

R. S. Q., Art. 5164 (8). Same as Ontario.

R. S. M., ch. 130, sec. 19. Same as Ontario, excepting (2) add "by the Manitoba Expropriation Act, for determining the compensation to be allowed for land expropriated."

N. B., 1891, ch. 18, sec. 17. Same as Ontario.

R. S. N. S., ch. 53, sec. 9 (8). Same as Ontario.

143. For the payment of such annual rent and every other annual rent agreed upon or ascertained, and to be paid for the purchase of any lands, or for any part of the purchase money of any lands, which the vendor agrees to leave unpaid, the railway and the tolls thereon shall be liable and chargeable in preference to all other claims and demands thereon whatsoever (except as to the charges created by section ninety-four of this Act), (1) upon the deed creating such charge and (liability) (2) being duly registered in the registry office of the proper district, county or registration division.

R. S. O., ch. 170, sec. 17.—(1) Omitted.

R. S. Q., Art. 5164 (9). Same as Ontario, excepting (2) "mortgage."

R. S. M., ch. 130, sec. 19. Same as Ontario.

N. B., 1891, ch. 18, sec. 17.

R. S. N. S., ch. 53, sec. 9 (9). Same as Ontario.

144. After the expiration of (ten days) (1) from the deposit of the map or plan and book of reference (in the office of the registrar of deeds), (a) and after notice thereof has been given in at least one newspaper, if there is any, published in each of the (districts and) (2) counties through which the railway is intended to pass, (3) application may be made to the owners of lands, or to persons empowered to convey lands, or interested in lands which may suffer damage from the taking of materials or the exercise of any of the powers granted for the railway; and, thereupon, agreements and contracts may be made with such persons, touching the said lands or the compensation to be paid for the same, or for the damages or as to the mode in which

Arbitration
in default of
agreement.

such compensation shall be ascertained, as seems expedient to both parties; and in case of disagreement between them, or any of them, all questions which may arise between them shall be settled as (4) hereinafter provided.

R. S. O., ch. 170, sec. 19.—(1) "one month," (a) omitted.

R. S. Q., Art. 5164 (11).—(1) "one month," (2) omitted, (a) omitted.

R. S. M., ch. 130, sec. 21. Same as Dominion from (3) to (4), all prior to (3) omitted. After (4) substitute "in the 'Manitoba Expropriation Act' mentioned."

N. B., 1891, ch. 18, sec. 18. Same as Quebec.

R. S. N. S., ch. 53, sec. 9 (10). Same as Dominion, excepting (1) "one month," (a) omitted.

Deposit to be
general
notice.

145. The deposit of a map or plan and book of reference, and the notice of such deposit, shall be deemed a general notice to all the parties, (1) of the lands which will be required for the railway and works (and the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained). (2)

R. S. O., ch. 170, sec. 19 (2).—(1) "aforesaid," (2) omitted.

R. S. Q., Art. 5164 (12).—(2) Omitted.

N. B., 1891, ch. 18, sec. 19. Same as Dominion, excepting (1) "aforesaid."

R. S. N. S., ch. 53, sec. 9 (11). Same as Ontario, excepting "aforesaid" omitted.

Notice to the
party and
what it shall
contain.

146. The notice served upon the party shall contain :—

(a) A description of the lands to be taken, or of the powers intended to be exercised with regard to any lands, and describing the lands ;

(b) A declaration of readiness to pay some certain sum or rent, as the case may be, as compensation for such lands or for such damages ;

(c) The name of a person to be appointed as the arbitrator of the company, if its offer is not accepted.

R. S. O., ch. 170, sec. 20 (1).

R. S. Q., Art. 5164 (13).

N. B., 1891, ch. 18, sec. 20.

R. S. N. S., ch. 53, sec. 9 (12).

Certificate of
surveyor and
what it shall
state.

147. Such notice shall be accompanied by the certificate of a sworn surveyor (for the Province in which the lands are situated or an engineer) (1) who is a disinterested person, and is not the arbitrator named in the notice, which certificate shall state :—

(a) That the land, if the notice relates to the taking of land, shown on the said map or plan, is required for the railway, or is within the limits of deviation hereby allowed ;

(b) That he knows the land, or the amount of damage likely to arise from the exercise of the powers ; and—

(c) That the sum so offered is, in his opinion, a fair compensation for the land and damage aforesaid.

R. S. O., ch. 170, sec. 20 (2).

R. S. Q., Art. 5164 (13), sub-sec. 3,—(1) Omitted.

N. B., 1891, sec. 20 (2). Same as Quebec.

R. S. N. S., ch. 53, sec. 9 (12).—(1) omitting “ or an engineer.”

148. If the opposite party is absent from the district or county in which the lands lie, or is unknown, an application for service by advertisement may be made to a judge.

Application for service by advertisement.

R. S. O., ch. 170, sec. 20 (3). If the opposite party is absent from the (district or) (1) county in which the lands lie, or is unknown, then upon application to a judge of (the County Court) (2) accompanied by such certificate as aforesaid, and by an affidavit of some officer of the company that the opposite party is so absent, or that after diligent enquiry the party on whom such notice ought to be served cannot be ascertained, the judge shall order a notice as aforesaid, but without a certificate, to be inserted three times in the course of one month in some newspaper, if there is any published in the said (district or) county. (3).

R. S. Q., Art. 5164 (14). Same as Ontario, excepting (2) “ Superior Court residing in the district, or to any judge of the said Court exercising his functions therein,” (3) “ and if there be no newspaper published therein, then in a newspaper published in some adjacent district or county.”

N. B., 1891, ch. 18, sec. 20 (3). Same as Ontario, excepting (1) omitted.

R. S. N. S., ch. 53, sec. 9 (13). Same as Ontario, excepting (2) “ Supreme Court,” (3) same as Quebec.

149. The application for service by advertisement shall be accompanied by such certificate as aforesaid, and by an affidavit of some officer of the company, that the opposite party is so absent, or that, after diligent inquiry, the person on whom the notice ought to be served cannot be ascertained ; and the judge shall order a notice as aforesaid, but without such certificate, to be inserted three times in the course of one month, in a newspaper published in the district or county, or if there is no newspaper published therein, then in a newspaper published in some adjacent district or county.

Certificate and affidavit to accompany application.

Notice.

R. S. O., ch. 170, sec. 20 (3).

R. S. Q., Art. 5164 (14).

N. B., 1891, ch. 18, sec. 20 (3).

R. S. N. S., ch. 53, sec. 9 (13).

} See notes to Dom. Act, sec. 148.

R. S. O., ch. 170, sec. 20 (4). "Where a Judge of a County (or district) (1) Court is interested in lands taken or required within the County in which he is Judge, by any company, for railway purposes, a Judge of the (High) (2) Court shall, on application of the company, exercise in such case all the powers given to a Judge of a County Court by the provisions of this section in cases in which he, such judge of a County Court, is not interested."

N. B., 1891, ch. 18, sec. 20 (4). Same as Ontario, excepting (1) omitted, (2) "Supreme."

R. S. Q., Art. 5164 (15). "Whenever any such judge is interested in any lands required by the company within the district in which he resides, or in which he exercises his functions, or whenever there is no judge in such district, any judge of the Superior Court, residing or exercising his functions in any adjoining district, who is not interested shall, on the application of the company, or of the opposite party, exercise in such cases all the powers given by this article to the resident judge, or to any judge exercising his functions in the district in which the required lands are situated."

Party not accepting offer and not appointing arbitrator.

150. If, within ten days after the service of such notice, or within one month after the first publication thereof, (1) the opposite party does not give notice to the company that he accepts the sum offered by it, or does not give notice to it of the name of a person whom he appoints as arbitrator, the judge shall, on the application of the company, appoint a (person) (2) to be sole arbitrator for determining the compensation to be paid as aforesaid.

R. S. O., ch. 170, sec. 20 (5). (1) "as aforesaid," (2) "sworn surveyor for Ontario."

R. S. Q., Art. 5164 (16). Same as Dominion, excepting (2) "sworn provincial land surveyor."

N. B., 1891, ch. 18, sec. 20 (5). Same as Ontario, excepting (2) "sworn surveyor."

R. S. N. S., ch. 53, sec. 9 (14). Same as Dominion, excepting (2) "a competent person, as the case may be."

Appointment of arbitrator by party and of third arbitrator.

151. If the opposite party, within the time aforesaid, gives notice to the company of the name of his arbitrator, then the two arbitrators shall jointly appoint a third, or if they cannot agree upon a third, the judge (a) shall, on the application of the party or the company, after notice of at least (six) (1) clear days having been given to the other party, appoint a third arbitrator.

R. S. O., ch. 170, sec. 20 (6). (1) "one."

R. S. Q., Art. 5164 (17). (a) "of the Superior Court," (1) "two."

N. B., 1891, ch. 18, sec. 20 (6). (1) "two days."

R. S. N. S., ch. 53, sec. 9 (15), as amended by 58 Vic. ch. 12. Same as Dominion, excepting (a), "Commissioner of Public Works," (1) "two" also additional. Ch. 37 of 52 Vic. (a) "But in case the moneys payable for lands, for track and station purposes shall by any law, or under any by-law of any municipality, be directed to be assessed upon the county in which the said lands lie, the said moneys so payable shall in the first instance be ascer-

tained, and the damages for such land so taken appraised, in all cases by three arbitrators, one to be appointed by the County Council of the municipality in which the said lands lie, another by the proprietor of the lands so taken, and the third by the two arbitrators so chosen, or if they cannot agree upon a third, then the Commissioner of Public Works shall on the application of the proprietor or council, or of the company, appoint an arbitrator to be a third arbitrator; and in case of the proprietor or County Council from any cause whatever neglecting for six months from the taking of such lands, or from the passing of this Act, whichever shall last happen, to appoint an arbitrator in writing, and to file such appointment with the Clerk of the municipality in which the said lands lie, then the Commissioner of Public Works shall on the application of the party, or of the County Council, appoint one arbitrator to be sole arbitrator." (b) "When the said moneys and damages shall be so ascertained and appraised, and shall have been assessed upon the County, the same shall, after the time for collection of the said assessment shall have elapsed, be paid by the county treasurer directly to the parties entitled." (c) "The cost of such appraisement shall be borne in equal proportions by the county and the proprietors."

152. The arbitrators, (1) or the sole arbitrator, as the case may be, shall be sworn before a justice of the peace for the district or county in which the lands lie, faithfully and impartially to perform the duties of their or his office, and shall proceed to ascertain such compensation in such way as they or he, or a majority of them, deem best (and the award of such arbitrators, or of any two of them, or of the sole arbitrator, shall be final and conclusive except as hereinafter provided); (2) but no such award shall be made, nor any official act be done by such majority, except at a meeting held at a time and place of which the other arbitrator has had at least (two) (3) clear days' notice, or to which some meeting at which the third arbitrator was present had been adjourned; and no notice to either of the parties shall be necessary, but each party shall be held sufficiently notified through the arbitrator appointed by him, or whose appointment he required.

R. S. O., ch. 170, sec. 20 (7).—(1) "or any two of them," (2) omitted, (3) "one."

R. S. Q., Art. 5164 (18).—(1) "or two of them," (2) omit "except as hereinafter provided."

N. B., 1891, ch. 18, sec. 20 (7). Same as Ontario, omitting "district" before "county."

R. S. N. S., ch. 53, sec. 9 (16). Same as Quebec.

153. The arbitrators, in deciding on such value or compensation (shall) (1) take into consideration the increased value that will be given to any lands (2) through or over which the railway will pass, by reason of the passage of the railway through or

Arbitrators to be sworn.

Their duties.

Increased value of remaining lands to be considered.

over the same, or by reason of the construction of the railway, and shall set off the increased value that will attach to the said lands or grounds against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands as aforesaid.

R. S. O., ch. 170, sec. 20 (9).—(1) "are authorized and required to," (2) "or grounds."

R. S. Q., Art. 5164 (19). Same as Ontario.

N. B., 1891, ch. 18, sec. 20 (9). Same as Dominion, omitting "by reason of the passage of the railway through or over the same."

R. S. N. S., ch. 53, sec. 9 (17). Same as Ontario.

Costs, by
whom pay-
able.

154. If (by an award of arbitrators made under this Act) (1) the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise, they shall be borne by the opposite party, and be deducted from the compensation; and in either case the amount of such costs, if not agreed upon, may be taxed by the judge. (2)

R. S. O., ch. 170, sec. 20 (8).—(1) "in any case where three arbitrators have been appointed," (2) "aforesaid."

R. S. Q., Art. 5164 (20). Same as Ontario, excepting (2) "upon a petition to that effect duly served upon the adverse party, at least two days beforehand, with a copy of the bill of costs in detail."

N. B., 1891, ch. 18, sec. 20 (8). Same as Ontario.

R. S. N. S., ch. 53, sec. 9 (18). Same as Ontario.

Witnesses.

155. The arbitrators, or a majority of them, or the sole arbitrator (shall) (1) examine on oath or solemn affirmation the parties, or such witnesses as appear before them or him, and shall administer such oath or affirmation.

Evidence to
be taken down
in writing.

2. The arbitrators shall take down the depositions of witnesses in writing, and after making their award shall forthwith deliver or transmit by registered letter, at the request of either party in writing, the depositions, together with the exhibits referred to therein, and all papers connected with the reference, except the award (to the clerk of a superior court in the province in which the lands are situated, to be filed with the records of the said court). (2)

Transmission
of record.

R. S. O., ch. 170, sec. 20 (10), (13). (1) "may," (2) substitute "to the Clerk of Records and Writs of the Chancery Division of the High Court, with appropriate stamps, to be filed by the clerk with the records of the Court."

R. S. Q., Art. 5164 (21). Same as Dominion, 1st part only, excepting (1) "may in their discretion."

N. B., 1891, ch. 18, sec. 20 (10), (13).—(1) "may," (2) "Clerk of the County Court for the County in which the lands lie, with the usual fees, to be filed with the records of the Court."

R. S. N. S., ch. 53, sec. 9 (19). Same as Quebec, excepting (1) "may."

156. (A majority of the arbitrators, at the first meeting after their appointment, or the sole arbitrator, shall) (1) fix a day on or before which the award shall be made; and if the same is not made on or before such day or some other day to which the time for making it has been prolonged, either by the consent of the parties or by (resolution of the arbitrators) (2) then the sum offered by the company, as aforesaid, shall be the compensation to be paid by the company. Time within which award is to be made.

R. S. O., ch. 170, sec. 20 (14).—(1) Substitute "The Judge by whom a third arbitrator or sole arbitrator is appointed shall, at the same time," (2) "the order of the Judge (as it may be for reasonable cause shewn, on the application of such sole arbitrator, or of one of the arbitrators, after one clear day's notice to the others)."

R. S. Q., Art. 5164 (22). Same as Dominion.

N. B., 1891, ch. 18, sec. 20 (14). Same as Ontario.

R. S. N. S., ch. 53, sec. 9 (20). Same as Dominion.

157. If the (sole) (1) arbitrator (a) appointed by the judge, or any (arbitrator) (b) appointed by the (two arbitrators) (2) dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then, in the case of the sole arbitrator, (c) the judge, upon the application of either party, (d) and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such (sole) (3) arbitrator; and (in the case of any arbitrator appointed by [one of] (e) the parties), (4) the company and party respectively may each appoint an arbitrator in the place of (its or) (5) his arbitrator so deceased or not acting (and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply), (6) but no recommencement or repetition of the previous proceedings shall be required in any case. Vacancy in the office of arbitrator, how filled. No recommencement of proceedings.

R. S. O., ch. 170, sec. 20 (15).—(1) Omitted, (2) "parties," (3) omitted, (4) omitted, (5) omitted, (6) omitted.

R. S. Q., Art. 5164 (23). Same as Dominion, excepting (a) "or the third arbitrator," (b) "arbitrators," (2) "parties, or the third arbitrator appointed by the two arbitrators," (c) "or in the case of the third arbitrator appointed by the judge," (d) "previous notice of at least two clear days having been given to the other party," (3) omitted, (e) omitted, (6) substitute "and if the com-

pany or the party refuse or neglect to appoint such arbitrator, on application by the company or the party, as the case may be, previous notice of at least two clear days having been given to the other party, the judge being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, or of the neglect to replace such arbitrator, so deceased or not acting, shall appoint another arbitrator in his place, and in the case of a third arbitrator appointed by the two arbitrators, the provisions of the seventeenth paragraph of this article shall apply."

N. B., 1891, ch. 18, sec. 20 (15). Same as Ontario.

R. S. N. S., ch. 53, sec. 9 (21). Same as Dominion, excepting (1) "the official arbitrator," (2) "Commissioner of Public Works, or any arbitrator appointed by the parties, or the third arbitrator appointed by the two arbitrators," (d) "And in the case of the official arbitrator, the Commissioner of Public Works, upon a like application, the judge or commissioner being satisfied", etc. (e) omitted. (5) omitted. (6) "the provisions of the sixteenth sub-section shall apply."

Company
may desist on
payment of
costs.

New notice
may be given.

158. In any case where the notice given improperly describes the land or material intended to be taken, or if the company decides not to take the land or material mentioned in the notice, it may abandon the notice and all proceedings thereunder, but shall be liable to the person notified for all damages or costs incurred by him in consequence of such notice and abandonment—such costs to be taxed in the same manner as costs after an award; and the company may give to the same or any other person notice for other land or material or for land or material otherwise described, notwithstanding the abandonment of the former notice.

R. S. O., ch. 170, sec. 20 (16). Any notice for lands as aforesaid may be desisted from, and new notice given with regard to the same or other lands to the same or any other party; but in such case the liability to the party first notified for all damages and costs by him incurred in consequence of such notice and desistment shall subsist (provided, however, that the right of desisting be not exercised more than once). (1)

R. S. Q., Art. 5164 (24). Same as Ontario, excepting (1) omitted.

N. B., 1891, ch. 18, sec. 20 (16).

R. S. N. S., ch. 53, sec. 9 (22). Same as Ontario.

Valuator or
arbitrator not
disqualified
unless person-
ally interest-
ed.

159. The (1) person offered or appointed as valuator, or as (sole) (2) arbitrator, shall not be disqualified because he is professionally employed by either party, or has previously expressed an opinion as to the amount of compensation, or because he is related or of kin to any (shareholder) (3) of the company, if he is not himself personally interested in the amount of the compensation; and no cause of disqualification shall be urged against any arbitrator appointed by the judge after his appointment, but the objection shall be made before the appointment,

and its validity or invalidity shall be summarily determined by the judge.

R. S. O., ch. 170, sec. 20 (17).—(1) "surveyor or other," (2) omitted, (3) "member."

R. S. Q., Art. 5164 (25). Same as Ontario, excepting (2) "sole."

N. B., 1891, ch. 18, sec. 20 (17). Same as Quebec.

R. S. N. S., ch. 53, sec. 9 (23). Same as Ontario, excepting (2) retained.

160. No cause of disqualification shall be urged against any arbitrator appointed by the company or by the opposite party after the appointment of a third arbitrator; and the validity or invalidity of any cause of disqualification urged against any such arbitrator, before the appointment of a third arbitrator, shall be summarily determined by the judge, on the application of either party, after (two) (1) clear days' notice to the other, and if the cause is determined to be valid, the appointment shall be null and void, and the party offering the person so adjudged to be disqualified shall be held not to have appointed an arbitrator.

R. S. O., ch. 170, sec. 20 (18).—(1) "one."

R. S. Q., Art. 5164, sec. 26. Same as Dominion.

N. B., 1891, ch. 18, sec. 20 (18).—(1) "ten."

R. S. N. S., ch. 53, sec. 9 (24). Same as Dominion.

161. No award (1) shall be invalidated by reason of any want of form or other technical objection, if the requirements of this Act have been substantially complied with, and if the award states clearly the sum awarded, and the lands or other property, right or thing for which such sum is to be compensation; and the person to whom the sum is to be paid need not be named in the award.

R. S. O., ch. 170, sec. 20 (19).—(1) "made as aforesaid."

R. S. Q., Art. 5164 (27).

N. B., 1891, ch. 18, sec. 20 (19).—(1) "made as aforesaid."

R. S. N. S., ch. 53, sec. 9 (25).

2. (Whenever the award exceeds four hundred dollars) (1) Appeal to a superior court. any party to the arbitration may, within one month after receiving a written notice from any one of the arbitrators (or the sole arbitrator, as the case may be) (2) of the making of the award, appeal therefrom upon any question of law or fact to a (Superior Court of the Province in which such lands are situate); (3) and upon the hearing of the appeal the court shall, if the same is a question of fact, decide the same upon the evidence (taken before the arbitrators), (4) as in a case of original jurisdiction.

R. S. O., ch. 170, sec. 20 (20).—(1) Omitted, (2) omitted, (3) "Judge of the High Court," (4) omitted.

N. B., 1891, ch. 18, sec. 20 (20).—(1) Omitted, (2) omitted, (3) "Judge of the Supreme Court," (4) same as Dominion.

Practice and proceedings in such case.

3. Upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from the decision of (an inferior court to the said court) (1) subject to any general rules or orders from time to time made by the judges of the said (superior court in respect to such appeals, which orders may, amongst other things, provide that any such appeal may be heard and determined by a single judge). (2)

R. S. O., ch. 170, sec. 20 (21).—(1) "The judge of the County Court under *The County Courts Act*." (2) "High Court, in the same manner as they are authorized to make other General Rules and Orders respecting practice and procedure, altering and regulating such practice and proceedings."

N. B., 1891, ch. 18, sec. 20 (21). "Upon such an appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of a Supreme Court judge."

Other remedies not affected.

4. The right of appeal hereby given shall not affect the existing law or practice (in any Province) (1) as to setting aside awards.

R. S. O., ch. 170, sec. 20 (22).—(1) Omitted.

N. B., 1891, ch. 18, sec. 20 (22). Same as Ontario.

Upon payment or tender of sum awarded possession may be taken.

162. Upon payment or legal tender of the compensation or annual rent, so awarded or agreed upon, (a) to the person entitled to receive the same, or upon the (payment in to court) of the amount of such compensation, in the manner (hereinafter mentioned) (b) the award or agreement shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon; and if any resistance or forcible opposition is made by any person to its so doing, the judge may, on proof to his satisfaction of such award or agreement, issue his warrant to the (sheriff of the district or county, or to a bailiff), (c) as he deems most suitable, to put down such resistance or opposition, and to put the company in possession; and the sheriff or bailiff shall take with him sufficient assistance for such purpose, and shall put down such resistance or opposition, and put the company in possession.

Warrant of possession.

R. S. O., ch. 170, sec. 20 (23).—(1) "deposit."

R. S. Q., Art. 5164 (28).

R. S. M., ch. 130, sec. 24.—(a) "as provided by the *Manitoba Expropriation Act*." (1) "deposit in Her Majesty's Court of Queen's Bench for Manitoba." (b) "mentioned in the *Manitoba Expropriation Act*." (c) "Sheriff of the judicial district or to the bailiff of the County Court of the Judicial Division in either of which the lands are situated."

N. B., 1891, ch. 18, sec. 20 (23). Same as Ontario, omitting "or to a bailiff as he deems most suitable."

R. S. N. S., ch. 53, sec. 9 (26). Same as Dominion, excepting "constable" for "bailiff."

163. Such warrant may also be granted by the judge, without such award or agreement, on affidavit to his satisfaction that the immediate possession of the lands, or of the power to do the thing mentioned in the notice, is necessary to carry on some part of the railway with which the company is ready forthwith to proceed.

R. S. O., ch. 170, sec. 20 (24).

R. S. Q., Art. 5164 (29).

R. S. M., ch. 130, sec. 25.

N. B., 1891, ch. 18, sec. 20 (24).

R. S. N. S., ch. 53, sec. 9 (27.)

164. The judge shall not grant any warrant under the next preceding section unless ten days' previous notice of the time and place when and where the application for such warrants is to be made has been served upon the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken, or which may suffer damage from the taking of materials sought to be taken, or the exercise of the powers sought to be exercised, or the doing of the thing sought to be done, by the company; and unless the company gives security to his satisfaction, by deposit in a chartered bank, designated by him, to the credit of the company and such person or party jointly, of a sum larger than his estimate of the probable compensation, and not less than (fifty per cent. above) (1) the amount mentioned in the notice served under (section one hundred and forty-six). (2)

R. S. O., ch. 170, sec. 20 (24). And upon the Company giving security to his satisfaction, and in a sum which shall not be less than double the amount mentioned in the notice, to pay or deposit the compensation to be awarded within one month after the making of the award, with interest from the time at which possession is given, and with such costs as may be lawfully payable by the Company. (a)

R. S. M., ch. 130, sec. 25. Same as Ontario.

R. S. Q., Art. 5164 (29). Same as Dominion, excepting (1) "double." (2) "paragraph 13 of this Article."

N. B., 1891, ch. 18, sec. 20 (24). Same as Ontario, excepting (a) additional, "but in granting such warrant, the judge shall impose such other terms for the purpose of expediting the fixing of compensation as he shall think just."

R. S. N. S., ch. 53, sec. 9 (27). (b)—Same as Dominion, excepting (1) "double" (2) "sub-section or of this section."

Costs.

165. The costs of any such application to, and of any such hearing before the judge, shall be borne by the company, unless the compensation awarded is not more than the company had offered to pay (1) and no part of such deposit or of any interest thereon shall be repaid, or paid to such company, or paid to such owner or party, without an order from the judge, which he may make in accordance with the terms of the award. (2)

Payment on judge's order only.

R. S. Q., Art. 5164 (29).—(1) insert: "The petition, writ of possession, certificate of deposit above mentioned, and all other documents connected with such incidental proceedings, shall remain of record in the archives of the Superior Court of the district in which such proceedings were held, and a special register of such proceedings shall be kept by the prothonotary." (2) additional, "Provided always that, when such owner or person is absent from the district, without having a known agent upon whom such service can be made, or when such owner is unknown, application for a warrant may be made, at any time after the expiration of the month's notice mentioned in paragraph fourteen of this article, without any other or further notice."

"Every proprietor who shall not be paid in full, in capital, interest and cost, the amount to him awarded by the arbitrators, within two months after such award, may then exercise his recourse against the company to recover the property in and possession of the land, by ordinary civil action, in which he may demand the damages to which he may be entitled."

R. S. N. S., ch. 53, sec. 9 (27). (b)—Same as Dominion.

Compensation to stand in the place of the land.

166. The compensation for any lands which may be taken without the consent of the proprietor shall stand in the stead of such lands; and any claim to or incumbrance upon the said lands, or any portion thereof, shall, as against the company, be converted into a claim to the compensation or to a like proportion thereof; and the company shall be responsible accordingly, whenever it has paid such compensation, or any part thereof, to a person not entitled to receive the same, saving always its recourse against such person.

R. S. O., ch. 170, sec. 20 (25).

R. S. Q., Art. 5164 (30).

N. B., 1891, ch. 18, sec. 20 (25).

R. S. N. S., ch. 53, sec. 9 (28).

Payment of compensation into court in certain cases.

167. If the company has reason to fear any claims or incumbrances, or if any person to whom the compensation or annual rent, or any part thereof is payable, refuses to execute the proper

conveyance and guarantee, or if the person entitled to claim the same cannot be found, or is unknown to the company, or if, for any other reason, the company deems it advisable, the company may (if the lands are situated elsewhere than in the Province of Quebec) (1) pay such compensation into the office of the (clerk or prothonotary of the court), (2) with the interest thereon for six months, and may deliver to such (clerk or prothonotary) (3) an authentic copy of the conveyance, or of the award or agreement, if there is no conveyance; and such award or agreement shall thereafter be deemed to be the title of the company to the land therein mentioned.

R. S. O., ch. 170, sec. 20 (26).—(1) omitted. (2) "Accountant of the Supreme Court of Judicature." (3) "accountant."

R. S. Q., Art. 5164 (31).—(1) omitted. (2) "Prothonotary of the Superior Court for the district in which the lands are situated." (3) "prothonotary."

N. B., 1891, ch. 18, sec. 20 (26).—(1) omitted. (2) "Clerk of the Pleas." (3) "Clerk of the Pleas."

R. S. N. S., ch. 53, sec. 9 (29). Same as Quebec, excepting "Supreme Court" for "Superior Court."

168. A notice in such form, and for such time as the (1) Notice to be court appoints, shall be inserted in a newspaper if there is any, published, published in the county in which the lands are situated (or if there is no newspaper published in the county, then in the official *Gazette* of the Province, if any, and also in a newspaper published in the nearest county thereto in which a newspaper is published), (2) which shall state that the title of the company—that is, the conveyance, agreement or award—is under this Act, and shall call upon all persons entitled to the lands, or to any part thereof, or representing or being the husbands of any persons so entitled, to file their claims to the compensation, or any Claims to be part thereof; and all such claims shall be received and adjudicated upon by the court, and the said proceedings shall forever adjudicated upon, bar all claims to the lands or any part thereof, including dower, (a) as well as all mortgages or incumbrances upon the same; and Distribution the court shall make such order for the distribution, payment or of compensation, investment of the compensation, and for the securing of the rights of all persons interested, as to right and justice (3) and to law appertains. (b)

R. S. O., ch. 170, sec. 20 (27).—(1) "High." (2) "and in the City of Toronto." (3) "and the provisions of this Act and the special Act."

R. S. Q., Art. 5164 (31) (32). "and proceedings shall be taken to obtain the confirmation of the company's title, except that, in addition to the usual contents of the notice, the prothonotary shall state that the company's title (that is to say, the conveyance or the award) is under this section," and shall call upon, etc., etc. Remainder same as Dominion Act, excepting (a) "not yet open," (b) "and the provisions of this section and of the charter and of the law require."

N. B., 1891, ch. 18, sec. 20 (27). (1) "Supreme." (2) omit, "if any, and also in a newspaper published in the nearest county thereto in which a newspaper is published." Rest same as Ontario.

R. S. N. S., ch. 53, sec. 9 (30), as amended by 55 Vic., ch. 35. Same as Dominion, excepting (2) "and at the seat of Government of the Province." (3) Same as Ontario.

Costs. **169.** The costs of the proceedings, in whole or in part (including the proper allowance to witnesses) (1) shall be paid by the company, or by any other person, as the court orders; and if (such order of distribution) (2) is obtained in less than six months from the payment of the compensation (into court) (3) the court shall direct a proportionate part of the interest to be returned to the company, and if, from any error, fault or neglect of the company, it is not obtained until after the six months have expired, the court shall order the company to pay to the (proper claimants) (4) the interest for such further period as is right.

Interest.

R. S. O., ch. 170, sec. 20 (28) (29).—(1) omitted.

R. S. Q., Art. 5164 (33).—(1) Omitted. (2) "judgment of confirmation," (3) "to the prothonotary," (4) "prothonotary."

N. B., 1891, ch. 18, sec. 20 (28) (29). Same as Ontario.

R. S. N. S., ch. 53, sec. 9 (31) (32). Same as Dominion, excepting (1) omitted.

Proceedings in a like case in the Province of Quebec. **170.** If the lands so taken are situated in the Province of Quebec, and if the company has reason to fear any claim, mortgage, *hypothèque* or incumbrance, or if any person to whom the compensation or annual rent, or any part thereof, is payable, refuses to execute the proper conveyance and guarantee, or if the person entitled to claim the compensation or rent cannot be found, or is unknown to the company, or if, for any other reason, the company deems it advisable, the company may pay such compensation into the hands of the prothonotary of the Superior Court for the district in which the lands are situate, with the interest thereon for six months, and may deliver to the said prothonotary an authentic copy of the conveyance, or of the award if there is no conveyance; and such award shall thereafter be deemed to be the title of the company to the lands therein mentioned.

Confirmation of title.

tioned, and proceedings shall thereupon be had for the confirmation of the title of the company, in like manner as in other cases of confirmation of title,—except that, in addition to the usual contents of the notice, the prothonotary shall state that the title of the company (that is, the conveyance or award) is under this Act, and shall call upon all persons entitled to the lands, or any part thereof, or representing or being the husband of any person so entitled, to file their claims to the compensation, or any part thereof; and all such claims shall be received and adjudicated upon by the court.

Special notice
in such case.

171. Such judgment of confirmation shall forever bar all claims to the land, or any part thereof, including dower not yet open, as well as any mortgage, *hypothèque* or incumbrance upon the same; and the court shall make such order for the distribution, payment or investment of the compensation, and for the security of the rights of all persons interested, as to right and justice and to law appertains.

Effect of confirmation.

Distribution
of compensation.

172. The costs of the proceedings, in whole or in part, shall be paid by the company, or by any other person, as the court orders, and if judgment of confirmation is obtained in less than six months from the payment of the compensation to the prothonotary, the court shall direct a proportionate part of the interest to be returned to the company; and if, from any error, fault, or neglect of the company, it is not obtained until after the six months have expired, the court shall order the company to pay the prothonotary the interest for such further period as is right.

Costs.

Interest.

RAILWAY CROSSINGS AND JUNCTIONS.

173. (*As amended by 56 Vic., ch. 27, sec. 1.*) The railway of any company shall not be crossed, intersected, joined or united by or with any other railway, nor shall any railway be intersected or crossed by any street railway, electric railway or tramway, whether constructed under Dominion or provincial or municipal authority or otherwise, unless the place and mode of the proposed crossing, intersection, or junction or union are first approved by the Railway Committee, on application therefor,—of which application ten clear days' notice in writing shall

Crossing subject to approval of Railway Committee.

Notice.

be given by the party or company desiring the approval, such notice to be sent by mail addressed to the president, general manager, managing director, secretary, or superintendent of the company whose railway is to be so crossed, intersected, joined or united; and in the case of crossing by street railways, electric railways or tramways respectively, the Railway Committee shall have the same powers in all respects as to the protection of such crossing and otherwise as are given the Railway Committee by this Act in regard to one railway crossing another.

Crossings by street railways, etc.

R. S. O., ch. 170, sec. 9 (16). The Company shall not avail itself of any of the powers contained in the last sub-section (uniting with and crossing other railways) without application to the (Commissioner of Public Works) (1) of which application notice in writing shall be given to any other railway affected, by sending the same by mail, or otherwise, to the address of the president, superintendent, managing director, or secretary of any such company, for approval of the mode of crossing, union, or intersection proposed; and when such approval has been obtained, it shall be lawful for either railway, in case of disagreement as to the amount to be paid for compensation, to proceed for such compensation as provided in the (last sub-section). (2)

R. S. O., Art. 5132 (15). Same as Ontario, excepting (1) "Railway Committee constituted under Art. 5182 for approval of the mode of junction, crossing, or intersection proposed," (2) "preceding paragraph 14"

R. S. M., ch. 130, sec. 26. "No railway company, whether incorporated by the Parliament of Canada or otherwise, shall cross, intersect, join or unite its railway with any railway subject to the legislative authority of the Legislature of Manitoba, without first obtaining the approval of the Railway Committee of the Executive Council of the Province of Manitoba, as to the place and mode of crossing, intersection, junction or union proposed. Ten days' notice in writing of the application to such committee shall be given by the company to any such company affected, by sending the same by mail or otherwise to the address of the president, superintendent, general manager, managing director, or secretary of such company."

N. B., 1891, ch. 18, sec. 9 (16). Same as Ontario, adding the word "chief" before "commissioner of public works."

R. S. N. S., ch. 53, sec. 7 (15). Same as Ontario, excepting (1) "Governor in Council for the approval of the mode of crossing, union or intersection proposed."

Railway Committee may make regulations.

174. The Railway Committee may make such orders and give such directions respecting the proposed crossing, intersection, junction or union, and the works to be executed and the measures to be taken by the respective companies, as to it appear necessary or expedient to secure the public safety.

R. S. M., ch. 130, sec. 27.

Necessary apparatus may be ordered to be adopted.

175. The Railway Committee may, on the application of any company (1) whose railway, at rail level, crosses or is crossed by the railway of any other company, direct such companies to

adopt and put in use at such crossing, within a reasonable time, to be fixed by such committee, such an interlocking switch and signal system or device, as, in the opinion of such committee, renders it safe to permit engines and trains to pass over such crossing without being brought to a stop.

R. S. M., ch. 130, sec. 28. (1) "subject to the legislative authority of the Legislature of Manitoba."

176. The companies may agree with each other as to the compensation to be paid by one to the other in respect of any crossing, intersection, junction or union, or the proportion to be borne by each of the costs of executing any work or taking any measure, or the carrying out of any order of the Railway Committee; but if they fail so to agree, the amount of such compensation, or the proportion of such costs so to be borne by each shall be determined by the Railway Committee.

R. S. O., ch. 170, sec. 9 (15). "and the owners of both railways may unite in forming such intersection and grant the facilities therefor; and in case of disagreement upon the amount of compensation to be made therefor, or upon the point or manner of such crossing and connection, the same shall be determined by arbitrators to be appointed by a judge of the (High Court.)" (a)

R. S. Q., Art. 5132 (14). Same as Ontario, excepting (a) "Superior Court."

R. S. M., ch. 130, sec. 29. Same as Dominion.

N. B., 1891, ch. 18, sec. 9 (15). Same as Ontario, excepting (a) "Supreme Court."

R. S. N. S., ch. 53, sec. 7 (14). Same as New Brunswick.

177. Every railway company, incorporated by any Act of the Legislature of any Province which crosses, intersects, joins or unites with any railway within the legislative authority of the Parliament of Canada, or which is crossed, or intersected by, or joined or united with, any such railway, shall, in respect of such crossing, intersection, junction and union, and all matters preliminary or incident thereto, be deemed to be, and be, within the legislative authority of the Parliament of Canada, and subject in respect thereof to the provisions of this Act.

R. S. O. ch. 170, sec. 9 (7). The provisions of the last preceding subsection, and the provisions for the ascertainment of compensation contained in sub-section 15 of this section, shall not extend or apply to any railway incorporated under any Act of the Legislature (of Ontario) (1) in any case in which it is proposed that such railway shall cross, intersect, join or unite with, or be crossed, intersected, joined or united with a railway under the legislative control of Canada.

N. B., 1891, ch. 18, sec. 9 (17). Same as Ontario, omitting (1).

NAVIGABLE WATERS.

Navigation
not to be im-
peded.

178. No company shall cause any obstruction in or impede the free navigation of any river, stream or canal, to or across or along which its railway is carried.

R. S. O., ch. 170, sec. 9 (5), (91).

R. S. Q., Art. 5144.

R. S. M., ch. 130, sec. 12 (6).

N. B., 1891, ch. 18, sec. 9 (5), (71).

R. S. N. S., ch. 53, sec. 64.

Bridges over
navigable
rivers, etc.

179. Whenever the railway is carried across any navigable river or canal, the company shall leave openings between the abutments or piers of its bridge or viaduct over the same, and shall make such bridge or viaduct of such clear height above the surface of the water, or shall construct such draw-bridge or swing-bridge over the channel of the river, or over the whole width of the canal, and shall be subject to such regulations as to the opening of such swing-bridge or draw-bridge as the (1) Governor in Council, from time to time, directs or makes.

R. S. O., ch. 170, sec. 92.—(1) "Lieutenant."

R. S. Q., Art. 5145. Same as Ontario.

N. B., 1891, ch. 18, sec. 72. Same as Ontario.

R. S. N. S., ch. 53, sec. 65. Same as Dominion.

Bridges to be
floored.

180. No company shall run its trains over any canal, or over the navigable channel of any river, without having first laid such proper flooring under and on both sides of its railway track over such canal or channel, as is deemed by the Minister sufficient to prevent anything falling from the railway into such canal or river, or upon the boats or vessels, or craft, or persons who navigate such canal or river.

Plans of
bridges, etc.,
to be ap-
proved.

181. No company shall construct any wharf, bridge, pier or other work upon or over any navigable river, lake or canal, or upon the beach or bed or lands covered with the waters thereof, until it has first submitted the plan and proposed site of such work to the (Railway Committee), (1) and the same has been approved; and no deviation from such approved site or plan shall be made without (the consent of the committee). (2)

R. S. O., ch. 170, sec. 93.—(1) "Lieutenant-Governor in Council." (2) "his consent."

R. S. Q., Art. 5146. Same as Dominion.

N. B., 1891, ch. 18, sec. 73. Same as Ontario.
R. S. N. S., ch. 53, sec. 66. Same as Dominion, excepting (1) (2)
"Governor in Council."

182. The Governor in Council may, upon the report of the Substitution
(Railway Committee) (2) authorize or require any company to of one form of
construct fixed and permanent bridges (or swing, draw or move- bridge for
ble bridges) (a) or to substitute any of such bridges for (existing another.
bridges) (3) on the line of its railway, within such time as the (4)
Governor in Council directs; and for every day after the period Penalty for
so fixed during which the company fails to comply with the non-compli-
directions of the Governor in Council, it shall forfeit and pay to ance.
Her Majesty the sum of two hundred dollars; and no company No swing
shall substitute any swing, draw or movable bridge for any fixed bridge to be
or permanent bridge already built and constructed without the substituted
previous consent of the (Railway Committee). (5) without per-
mission.

R. S. O., ch. 170, sec. 65.—(2) "Commissioner of Public Works." (3)
"swing, draw or moveable bridges." (4) "Lieutenant." (5) "Lieutenant
Governor in Council." (a) omitted.

R. S. Q., Art. 5194. (3) "swing, draw or moveable bridges." (a) omitted.

N. B., 1891, ch. 18, sec. 52.—(2) "Chief Commissioner of Public Works."
(a) omitted. (3) "swing, draw or moveable bridges." (5) "Lieutenant
Governor in Council."

HIGHWAY CROSSINGS.

183. The railway shall not be carried along an existing high- Railway not
way, but shall merely cross the same in the line of the railway, un- to be carried
less leave therefor has been obtained from the (Railway Com- along high-
mittee), (1) and no obstruction of such highway with the works permission of
shall be made without turning the highway so as to leave an open proper au-
and good passage for carriages, and, on completion of the works, thority.
replacing the highway; and every company which violates the pro- Penalty for
visions of this section shall incur a penalty of not less than forty contravention.
dollars for each such violation; but, in either case, the rail itself,
if it does not, when the works are completed, rise above or sink
below the surface of the road more than one inch, shall not be
deemed an obstruction.

R. S. O., ch. 170, sec. 29 (1).—(1) "proper municipal authority."

R. S. Q., Art. 5170 (1).—(1) "proper municipal or local authority."

R. S. M., ch. 130, sec. 31 (a). Same as Ontario.

N. B., 1891, ch. 18, sec. 21 (1). Same as Ontario.

R. S. N. S., ch. 53, sec. 15 (1). Same as Quebec.

Variation
when crossing
on the level.

184. Whenever any railway crosses any highway, without being carried over it by a bridge, or under it by a tunnel or bridge, whether the level of the highway remains undisturbed or is raised or lowered to conform to the grade of the railway, the top of the rails shall not, when the crossing is completed, rise above or sink below the level of the highway more than one inch.

R. S. O., ch. 170, sec. 29 (2). "No part of the railway which crosses a highway, without being carried over by a bridge or under by a tunnel, shall rise above or sink below the level of the highway more than one inch, and the railway may be carried across or above a highway within the limits aforesaid."

R. S. Q., Art. 5170 (2). As amended by 52 Vic. (Que.) ch. 44. Same as Dominion.

R. S. M., ch. 130, sec. 31 (b). Same as Ontario.

N. B., 1891, ch. 18, sec. 21 (2). Same as Ontario.

R. S. N. S., ch. 53, sec. 15 (2).

Dimensions of
bridges over
highways, and
inclination.

185. The span of the arch of every bridge erected for carrying the railway over or across any highway shall, at all times, be and be continued of the open and clear breadth and space, under such arch, of not less than twenty feet, and of a height, from the surface of such highway to the centre of such arch, of not less than twelve feet; and the descent of the highway passing under any such bridge shall not exceed one foot in twenty feet.

R. S. M., ch. 130, sec. 31 (c).

R. S. Q., Art. 5170 (3).

R. S. O., ch. 170, sec. 29 (5). "Overhead bridges, and other erections or structures over a railway, shall be constructed and maintained in conformity with sections 4 and 5 of *The Railway Accidents Act*."

R. S. N. S., ch. 53, sec. 15 (3). Same as Dominion.

Inclination of
highway at
crossings.

186. The inclination of the ascent or descent, as the case may be, of any approach by which any roadway is carried over or under any railway or across it at rail level shall not be greater than one foot of rise or fall for every twenty feet of the horizontal length of such approach, unless the Railway Committee directs otherwise; and a good and sufficient fence shall be made on each side of such approach, and of the bridge or passage connected with it,—which fence shall be at least four feet in height from the surface of the approach, bridge or passage; and, in respect to railways which, on the nineteenth day of April, one thousand eight hundred and eighty-four, were under construction or already constructed, the Railway Committee shall determine the proportion in which the cost of providing such fencing for such ap-

Fences.

Cost thereof
in certain
cases.

proach shall be borne by the company or municipality or person interested.

R. S. O., ch. 170, sec. 29 (3). "The ascent of all bridges erected to carry a highway over a railway shall not be more than one foot in twenty feet increase over the natural ascent of the highway, and a good and sufficient fence shall be made on each side of every bridge, which shall not be less than four feet above the surface of the bridge."

R. S. O., Art. 5170 (4). Same as Ontario.

R. S. M., ch. 130, sec. 31 (d). Same as Ontario.

N. B., 1891, ch. 18, sec. 29 (3). Same as Ontario.

R. S. N. S., ch. 53, sec. 15 (4).

187. Whenever any portion of a railway is constructed, or ^{Plan of cross-} authorized or proposed to be constructed upon or along or across ^{ing of high-} any street or other public highway at rail level or otherwise, the ^{way on the} company, before constructing or using the same, or, in the case ^{level to be} of railways already constructed, within such time as the Railway ^{submitted.} Committee directs, shall submit a plan and profile of such portion of railway for the approval of the Railway Committee; and ^{Powers of} the Railway Committee, if it appears to it expedient or neces- ^{Railway} sary for the public safety, may, from time to time, with the ^{Committee in} sanction of the Governor in Council, authorize or require the ^{such case.} company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates, or other protection,—or to carry such street or highway either over or under the said railway by means of a bridge or arch, instead of crossing the same at rail level,—or to divert such street or highway either temporarily or permanently,—or to execute such other works and take such other measures as under the circumstances of the case appear to the Railway Committee best adapted for removing or diminishing the danger arising from the then position of the railway; and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Railway Committee under this section. ^{As to land re-}

R. S. O., ch. 170, sec. 66. In any case where a railway (commenced after the 27th May, 1887) (1) is constructed across a (2) road, street, or other public highway on the level, the (Chief Commissioner of Public Works) (3) if it appears to him necessary for the public safety, may, with the sanction of the Lieutenant Governor in Council, authorize and require the Company to whom

the railway belongs, within such time as the (Chief Commissioner) (4) directs, to carry the road, street or highway by means of a bridge or arch, either over or under the railway, instead of crossing the same on the level, or to execute such other work as under the circumstances of the case appear to (him) (5) the best adapted for removing or diminishing the damage arising from such level crossing; and all the provisions of law at such time applicable to the taking of land by Railway Companies, and its valuation and conveyance to them, and to the compensation therefor, shall apply to the case of land required for the construction of any works for effecting the alteration of such level crossing.

R. S. Q., Art. 5195. Same as Ontario, excepting (1) omitted, (2) "turn-pike road," (3) "Railway Committee," (4) "said Committee," (5) "the said Committee."

N. B., 1891, ch. 18, sec. 53. Same as Ontario, excepting (1) omitted.

R. S. N. S., ch. 53, see sec. 75.

Railway
Committee
may make
regulations.

188. The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection, between the said company and any person interested therein, as appear to the Railway Committee just and reasonable.

Penalty for
non compli-
ance.

189. Every company shall incur a penalty of fifty dollars for each and every day after the expiration of the date fixed by the Railway Committee for the execution of any such works during which such works remain uncompleted, and for each and every day after the date fixed by the Railway Committee for the taking of any measure for the protection of any such street or highway, or for removing or diminishing such danger as aforesaid, on which the company fails to take such measure: Provided, however, that the Railway Committee may extend the time for the completion of the said work upon proper cause shown.

R. S. M., ch. 130, sec. 31 (f). "for every neglect to comply with the requirements of clause 31, a penalty not exceeding forty dollars shall be incurred."

Signboards
over railway
crossings.

190. Signboards at every highway crossed at rail level by any railway shall be erected and kept up at each crossing, and shall have the words "railway crossing" painted on each side of the signboard, in letters at least six inches in length, and in the Province of Quebec such words shall be painted in both the English and the French languages; and every company which neglects to comply with the requirements of this section shall incur a penalty not exceeding forty dollars.

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R. S. O., ch. 170, sec. 29 (4). "Signboards stretching over (1) the highway crossed at a level by a railway shall be erected and kept up at each crossing, at such height as to leave sixteen feet from the highway to the lower edge of the signboard, and having the words "*Railway Crossing*" painted on each side of the signboard, and in letters not less than six inches in length, and for every neglect to comply with the requirement of this clause, a penalty not exceeding forty dollars shall be incurred."

R. S. Q., Art. 5170 (6). Same as Ontario, excepting (1) "or projecting across."

N. B., 1891, ch. 18, sec. 21 (4). Same as Ontario.

R. S. N. S., ch. 53, sec. 15 (6). Same as Quebec.

FARM CROSSINGS.

191. Every company shall make crossings for persons across Farm cross-
whose lands the railway is carried, convenient and proper for the ^{ings.}
crossing of the railway by farmers' implements, carts and other
vehicles.

R. S. Q., Art. 5171 (2). "Farm crossings shall be made and maintained by the company, upon the application of any proprietor of land present or future, on each such land."

BRIDGES—TUNNELS.

192. Every bridge or other erection or structure or tunnel over or through or under which any railway passes, and every tunnel through which any railway passes, shall, at all times, be so maintained as to admit of an open and clear headway of at least seven feet between the top of the highest freight cars used on the railway and the bottom of the lower beams, members or portions of that part of such bridge, erection, structure or tunnel which is over the railway ;

2. The company, before using higher freight cars than those which admit of such open and clear headway of at least seven feet, shall, after having first obtained the consent of the municipality or of the owner of such bridge or other erection, structure or tunnel, raise every such bridge or other erection, structure or tunnel, and the approaches thereto, if necessary, so as to admit of such open and clear headway of at least seven feet ;

R. S. O., ch. 170, sec. 29 (5). "Overhead bridges, and other erections and structures over a railway, shall be constructed and maintained in conformity with sections 4 and 5 of *The Railway Accident Act*."

N. B., 1891, ch. 18, sec. 21 (5). Whenever a bridge or any other erection or structure (or tunnel) (1) shall be constructed (2) over or on a railway, or whenever it shall become necessary to reconstruct any highway bridge, or other erection, or structure (or tunnel) (3) already built (and under or through

which it is proposed to construct a railway) (4), or to make large repairs to the same (such bridges or erections, structures or tunnels, and the approaches thereto, if necessary) (5) shall be constructed or reconstructed (by and) (6) at the cost of the Railway Company or (7) other owner of bridge erections, or structures (or tunnels), (8) as the case may be, and shall be so constructed, and at all times be maintained at a sufficient height from the surface of the rails of the railway to admit of an open and clear headway of not less than seven feet between the top of the highest freight cars then running on the railway and the lowest beams, members or portions of such bridge, or other erection (or tunnel), (9) and thereafter any Railway Company, before using higher freight cars than those running on their railways at the time of the construction or reconstruction of or large repairs to such bridge, or other erection, or structure (or tunnel) (10) shall, after having first obtained the consent of the municipality or of the owners of such highway bridge, or other erection, or structure (or tunnel) raise the said bridge, or other erection, or structure (or tunnel), (11) and the approaches thereto, if necessary, at the cost and charges of the Railway Company, so as to admit as aforesaid an open and clear headway of not less than seven feet over the highest freight car then about to be used on the railway.

R. S. Q., Art. 5170 (5). Same as New Brunswick, excepting (1) omitted, (2) "for the passage of a highway," (3, 8, 9, 10, 11) omitted, (4) omitted, (5) "the lower beams or members of the superstructure of any such bridge, or of any other structure and the approaches thereto," (6) omitted, (7) "or of the municipality."

R. S. Q., ch. 212, sec. 4. Same as Quebec. (As to reconstruction of bridges existing on the 4th March, 1881. See 44 Vic., ch. 22, sec. 4, Ont.)

R. S. N. S., ch. 53, sec. 15 (5) (6).

Bridge, etc.,
to be raised
when re-con-
structed.

3. Whenever any bridge, erection, structure or tunnel is constructed over or on the line of a railway, or whenever it becomes necessary to reconstruct any bridge, erection, structure or tunnel already built over or on the line of a railway, or to make large repairs to the same, such bridge, erection, structure or tunnel, and the approaches thereto, if necessary, shall be constructed, reconstructed or repaired at the cost of the company, or of the municipality or other owner of the bridge, erection, structure or tunnel, as the case may be, and shall be so constructed and at all times maintained as to admit of an open and clear headway of at least seven feet between the top of the highest freight cars then used on the railway and the bottom of the lower beams, members or portions of that part of such bridge, erection, structure or tunnel which is over the railway;

See notes to sec. 192 (1) (2) Dominion Act.

And clear
headway
maintained
thereafter.

4. Such company shall thereafter, before using higher freight cars than those used on its railway at the time of the construction or reconstruction of, or large repairs to, such bridge, erection, structure or tunnel, after having first obtained the consent of the

municipality, or of the owner of such bridge, erection, structure or tunnel, raise the said bridge or other erection, structure or tunnel, and the approaches thereto, if necessary, so as to admit, as aforesaid, of an open and clear headway of at least seven feet over the top of the highest freight car then about to be used on the railway;

See notes to sec. 192 (1) (2) Dominion Act.

5. The Governor in Council may exempt from the operation of this section any bridge, erection, structure or tunnel which is upon any portion of any line of railway on all the cars of the trains running, upon which air-brakes are used or otherwise;

6. Every company shall incur a penalty not exceeding fifty dollars per day for every day of wilful neglect, omission or refusal to obey the provisions of this section. Penalty for non-compliance.

193. No company shall run its trains on any bridge unless such bridge is constructed and maintained with safeguards approved by the Minister. When only trains may be run over a bridge. This section shall not apply to any bridge already constructed, until six months after the passing of this Act.

FENCES AND CATTLE-GUARDS.

194. When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence, with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle-guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway: Fences, cattle guards, etc., to be erected and maintained. Provided always As to N.B., N.S., and P.E.I. that in New Brunswick, Nova Scotia and Prince Edward Island, wherever a county municipality has not been subdivided into local municipalities, each improved or occupied lot of land shall be protected by fences, gates and cattle-guards, as in this section provided;

2. A hurdle gate has proper fastenings if it is fifteen inches longer than the opening and is supported at each end by two up-right posts; Fastenings at hurdle gates.

R. S. O., ch. 170, sec. 30 (1). "Fences shall be erected and maintained on each side of the railway, of the height and strength of an ordinary division fence, with openings or gates, or bars therein at farm crossings of the road, for the use of the proprietors of the lands adjoining the railway; and also cattle-guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

R. S. O., ch. 170, sec. 30 (2). (The said words "openings, gates or bars" shall be held to mean, and shall in all cases imply, sliding gates, commonly called hurdle gates, with proper fastenings), (1) but this shall not be interpreted to the profit of those proprietors and tenants of lands crossed by railways who had received compensation from the railway companies, for having omitted the erection of such gates before the 10th June, 1847, nor shall it in any way affect or apply to any railway constructed or in part constructed, on the 10th June, 1847; but the same shall apply only to railways constructed or commenced after that day.

R. S. Q., Art. 5171 (1). "Within six months after any lands have been taken for the use of the railway, the company shall, if thereunto required by the proprietors of the adjoining lands, at its own costs and charges, erect and maintain, on each side of the railway, fences of the height and strength of an ordinary division fence (with sliding gates, commonly called hurdle-gates), with proper fastenings and farm crossings on the road for the use of the proprietors of the lands adjoining the railway; and also cattle guards at all (2) road crossings, suitable and sufficient to prevent cattle and other animals from getting on the railway."

R. S. N. S., ch. 53, sec. 16 (1). Same as Quebec, excepting (1) "Suitable gates." (2) "public."

R. S. M., ch. 130, sec. 32. Same as sec. 30 (1). Ontario.

R. S. M., ch. 130, sec. 33. Same as sec. 30 (2). Ontario part (1).

N. B., 1891, ch. 18, sec. 22 (1). "Sufficient fences of the lawful height of four feet six inches shall be erected with gates, as hereinafter mentioned, by the Company on each side of the railway as their rails are laid in construction, and thereafter such fences shall be maintained by the Company at their own cost and charges, with gates thereon at farm crossings of the road for the use of the proprietors of the lands adjoining the railway, and also cattle yards, at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

N. B., 1891, ch. 18, sec. 22 (7). "During construction and until permanent fences have been erected as required by this section, it shall be the duty of the Company to replace and put up any line fences dividing adjoining occupiers which they may have taken down, removed or interfered with in connection with the work. The fences shall be of such construction as will keep out swine, sheep and cattle; and if made of wire, the wires shall not be more than eight inches apart." Sec. 22 (2). "The expression 'gates' shall be held to mean and shall in all cases imply swinging gates with proper fastenings."

Omission or neglect to make fences, &c.

3. (As amended by 53 Vic., ch. 28, sec. 2.) "If the company omits to erect and complete as aforesaid any fence or cattle guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such

animal for all damages in respect of it caused by any of the company's trains or engines ; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway, merely for the reason that the owner or occupant of such place has not permitted it to be there."

Responsibility
for damages to
animals.

R. S. O., ch. 170, sec. 30 (3). "Until such fences and cattle guards are duly made, the company shall be liable for all damages which may be done by their trains or engines to cattle, horses or other animals on the railway."

R. S. Q., Art. 5171 (3). Same as Ontario.

R. S. M., ch. 130, sec. 34. Same as Ontario.

N. B., 1891, ch. 18, sec. 22 (3). Same as Ontario.

R. S. N. S., ch. 53, sec. 16 (2). Same as Ontario.

195. If the land through or by which the railway passes is occupied at the time of the construction of the railway opposite thereto, the company shall make such fences, gates and cattle-guards as they lay their rails.

Time for construction if
land is occupied.

N. B., 1891, ch. 18, sec. 22 (7). See notes to sec. 194, Dominion Act (*supra*).

196. After such fences (gates) (1) and guards have been duly made and completed, and while they are duly maintained, no such liability shall accrue for any such damages, unless the same are caused wilfully or negligently by the company or by its employees). (2)

When company is exempted from liability.

R. S. O., ch. 170, sec. 30 (4).—(1) omitted, (2) "unless negligently or wilfully done."

R. S. Q., Art. 5171 (4). Same as Ontario.

R. S. M., ch. 130, sec. 35. Same as Ontario.

N. B., 1891, ch. 18, sec. 22 (4). Same as Ontario, excepting (1) "gates."

R. S. N. S., ch. 53, sec. 16 (3). Same as Ontario.

197. (*As amended by 55-56 Vic., ch. 27, sec. 6.*) At every public road crossing at rail level of the railway, the fence on both sides of the crossing and on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains."

Fencing at crossings.

R. S. O., ch. 170, sec. 106. "At every road and farm crossing on the grade of the railways in this Province, the crossings shall be sufficiently fenced on both sides of such points, so as to allow the safe passage of trains." (1)

R. S. Q., Art. 5159. Same as Ontario, excepting (1) additional, "without danger to animals."

198. The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed when

Gates at farm crossings to be kept closed.

not in use ; and no person, any of whose cattle are killed by any train owing to the non-observance of this section, shall have any right of action against any company in respect to the same being so killed.

Penalty for leaving gates open.

199. Every person who wilfully leaves any such gate open without some person being at or near it to prevent animals from passing through it on to the railway, or who takes down any part of a railway fence, or turns any horse, cattle or other animal upon or within the enclosure of such railway, is liable, on summary conviction, to a penalty of twenty dollars for each offence, and is also liable to the railway company for any damage to the property of the company or for which the company is responsible, by reason of such gate being so left open, or by reason of such fence being so taken down, or by the turning upon or within the enclosure of such railway of any horse, cattle or other animal ; and no person, any of whose cattle are killed by any train owing to the non-observance of this section, shall have any right of action against any company in respect to the same being so killed.

Company not liable in such case.

INSPECTION OF RAILWAY BEFORE OPENING.

Notice to Railway Committee before railway is opened.

200. No railway, or portion of any railway, shall be opened for the public conveyance of passengers, until one month after notice in writing of the intention to open the same is given to the (Minister) (1) by the company to which the railway belongs, and until ten days after notice in writing is given to the (Minister) (2) by the company, of the time when the railway or portion of railway will be, in the opinion of the company, sufficiently completed for the safe conveyance of passengers, and ready for inspection.

R. S. O., ch. 170, sec. 52.—(1) "Commissioner of Public Works," (2) "Commissioner."

R. S. Q., Art. 5184.—(1) (2) "A Railway Committee."

N. B., 1891, ch. 18, sec. 39. Same as Ontario, adding "Chief" before "Commissioner."

R. S. N. S., ch. 53, sec. 34.—(1) "Governor-in-Council. (2) "Governor-in-Council."

Penalty for non-compliance.

201. If any railway or portion of a railway is opened without such notices, the company to which such railway belongs

shall forfeit to Her Majesty the sum of two hundred dollars for every day during which the same continues open, until the said notices have been duly given and have expired.

R. S. O., ch. 170, sec. 53.

R. S. Q., Art. 5185.

N. B., 1891, ch. 18, sec. 40.

R. S. N. S., ch. 53, sec. 35.

202. The (Minister), (1) upon receiving such notification, Railway to be shall direct one or more engineers (2) to examine the railway inspected. proposed to be opened, and all bridges, culverts, tunnels, road crossings and other works and appliances connected therewith, and also all engines and other rolling stock intended to be used thereon; and if the inspecting engineer reports in writing to the (Minister) (3) that, in his opinion, the opening of the same would be attended with danger to the public using the same, by reason of the incompleteness of the works or permanent way or of the insufficiency of the establishment for working such railway, together with the ground of such opinion, the (Minister), (4) with the sanction of the Governor in Council,—and so, from time to time, as often as such engineer, after further inspection thereof, reports to the like effect,—may order and direct the company to which the railway belongs, to postpone such opening for any time not exceeding one month at any one time, until it appears to the (Minister) (5) that such opening may take place without danger to the public.

Postponement
of opening if
report is un-
favorable.

R. S. O., ch. 170, sec. 51. "The Lieutenant Governor in Council may appoint and authorize any proper person, or persons, not exceeding three in number, whose duty it shall be from time to time to inspect all railways constructed or in course of construction, and every person so authorized may at all reasonable times, upon producing his authority, if required, enter upon and examine the railway and the stations, fences or gates, road crossings, cattle guards, works, and buildings, and the engines, cars and carriages belonging thereto."

R. S. O., ch. 170, sec. 54. "If the railway inspectors, after inspection of a railway, report in writing to the Commissioner of Public Works that, in their opinion, the opening of the same would be attended with danger to the public using the same by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working the railway, together with the grounds of such opinion, the Commissioner of Public Works, with the sanction of the Lieutenant Governor in Council, and so from time to time as often as the inspectors, after further inspection thereof, so report, may order and direct the company to which the railway belongs to postpone the opening for a period not exceeding one month at any one time, until it appears to the Chief Commissioner of Public Works that such opening may take place without danger to the public."

R. S. Q., "Art. 5186. Same as Dominion, excepting (1) 'Railway Committee,' (2) 'attached to the Department of Public Works,' (3) (4) (5) 'Railway Committee.'"

N. B., 1891, ch. 18, secs. (38), (41). Same as secs. (51), (54), Ontario, adding word "Chief" before "Commissioner."

Penalty for opening contrary to order.

203. If any railway or any portion thereof is opened contrary to such order or direction of the (Minister), the company to whom the railway belongs shall forfeit to Her Majesty the sum of two hundred dollars for every day during which the same continues open contrary to such order or direction.

R. S. O., ch. 170, sec. 55.—(1) "Commissioner."

R. S. Q., Art. 5187.—(1) "Railway Committee."

N. B., 1891, ch. 18, sec. 42.—(1) "Chief Commissioner of Public Works,"

R. S. N. S., ch. 53, sec. 37.—(1) "Governor in Council."

Order not binding with out copy of report.

204. No such order shall be binding upon the company unless a copy of the report of the (inspecting engineer) (1) on which the order is founded is delivered to the company with such order.

R. S. O., ch. 170, sec. 56.—(1) Inspectors.

R. S. Q., Art. 5188. Same as Dominion.

N. B., 1891, ch. 18, sec. 43.—(1) "Inspectors."

R. S. N. S., ch. 53, sec. 38. Same as Dominion.

INSPECTION OF RAILWAY OUT OF REPAIR—REPAIRS.

Proceedings if part of railway is out of repair.

205. Whenever the (Minister) (1) receives information to the effect that any bridge, culvert, viaduct, tunnel or any other portion of any railway, or any engine, car or carriage used or for use on any railway, is dangerous to the public using the same, from want of repair, insufficient or erroneous construction, or from any other cause, or whenever circumstances arise which, in his opinion, render it expedient, he may direct one or more engineers to examine and inspect the railway or any portion thereof, or of the works connected therewith, or the engines and other rolling stock in use thereon, or any portion thereof, and, upon the report of the inspecting engineer, may condemn the railway or any portion thereof, or any of the rolling stock or other appliances used thereon, and, with the approval of the (2) Governor in Council, may require any change or alteration therein or in any part thereof, or the substitution of any new bridge, culvert, viaduct or tunnel, or of any material for the said railway; and thereupon the company to which such railway belongs, or the

Defects to be made good.

company using, running or controlling the same, shall, after notice thereof in writing, (3) proceed to make good or remedy the defects in the said portions of the railway, or in the locomotive, car or carriage which has been so condemned, or make such change, alteration or substitution as has been required by the (Minister). (4)

N. B., 1891, ch. 18, sec. 44. "When a bridge, culvert, viaduct, tunnel, fence, cattle guard, road crossing, or any portion of a railway constructed or in course of construction, or a locomotive, car or carriage used or for use on a railway, has been condemned, on the report of an inspector, by the Chief Commissioner of Public Works, with the approval of the Lieutenant Governor in Council, the Company to which the railway belongs, or the Company using, running, or controlling the same, shall, after such notice in writing signed by the Chief Commissioner of Public Works, proceed to make good or remedy the defects in the said portion of the railway, or in the locomotive or carriage, which shall have been so condemned, and when any change or any alteration in any railway, or any part thereof, or the substitution of a new bridge, culvert, viaduct, or tunnel, or of any material for the said railway has been required by the Chief Commissioner of Public Works, as aforesaid, the Company to which the railway belongs, or the Company using, running, or controlling the same, shall make such change, alteration or substitution hereinafter referred to, as has been required in the manner aforesaid by the Chief Commissioner."

R. S. O., ch. 170, sec. 57. Same as New Brunswick.

R. S. Q., Art. 5189. Same as Dominion, excepting (1) "Railway Committee," (2) "Lieutenant," (3) "signed by the Chairman of the Committee, and countersigned by the Secretary thereof," (4) "Committee."

R. S. N. S., ch. 53, sec. 39.—(1) "Governor in Council." (2) Signed by the Commissioner of Public Works and Mines." (4) "Governor in Council."

206. Whenever that portion of any railway which crosses or is constructed upon or along any turnpike road, street or other public highway at rail level is out of repair, the chief officer of the municipality, or other local division, having jurisdiction over such highway, may serve a notice upon the company, in the usual manner, requiring the repair to be forthwith made; and, if the company does not forthwith make the same, such officer may transmit a copy of the notice so served to the Minister; and thereupon the Minister shall, with all possible dispatch, appoint a day for an examination into the matter; and shall, by mail, give notice to such chief officer and to the company of the day so fixed.

R. S. O., ch. 170, sec. 67 (1). Where a level crossing or a railway is out of repair, the (mayor, warden, reeve, or other chief officer) (a) of the Municipality (1) within whose jurisdiction the crossing is situate may serve a notice upon the Company in the usual manner, requiring the repair to be forthwith made, and if the Company does not forthwith make the same, such

If railway is out of repair at a crossing, notice to be given.

Proceedings thereafter.

officer may transmit a copy of the notice so served to the (Inspector of Railways), (2) and thereupon it shall be the duty of the (Inspector), (b) with all possible dispatch, to appoint a day when he will examine into the matter, and (he) (3) shall by mail give notice to the (mayor, warden, or proper officer), (4) and to the Company, of the day he so fixes, and upon the day named (he shall examine the crossing), (5) and a certificate under his hand shall be final upon the subject so in dispute between the parties, and if the Inspector determines that any repairs are required, he shall specify the nature thereof in his certificate, and direct the Company to make the same, and the Company shall thereupon, with all possible dispatch, comply with the requirements of the certificate, and in case of default, the municipality (6) within whose jurisdiction the said crossing is situate may make the repairs and may recover all costs, expenses and outlays in the premises by action against the Company in any Court of competent jurisdiction as money paid to the Company's use.

(2) Neither this section, nor any proceeding had thereunder, shall at all affect any liability otherwise attaching to the Company in the premises.

R. S. Q., Art. 5196. Same as Ontario, excepting (1) "or other local division," (2) "Secretary of the Railway Committee," (3) "the Committee," (4) "chief officer," (5) "such crossing shall be examined by an engineer appointed by the Railway Committee," (6) "or other local division," (a) "chief officer."

N. B., 1891, ch. 18, sec. 54. Same as Ontario.

R. S. N. S., ch. 53, sec. 46. Same as Quebec, excepting (2) "Commissioner of Public Works," (b) Governor in Council."

Inspection
and proceed-
ings there-
upon.

207. Upon the day so named the said portion of the railway shall be examined by the engineer directed by the Minister to make such examination, and any certificate under his hand shall be final on the subject so in dispute between the parties; and, if the inspecting engineer determines that any repairs are required, he shall specify the nature thereof in his certificate, and direct the company to make the same; and the company shall thereupon, with all possible despatch, comply with the requirements of such certificate.

R. S. O., ch. 170, sec. 67 (1).

R. S. Q., Art. 5196.

N. B., 1891, ch. 18, sec. 54.

R. S. N. S., ch. 53, sec. 46.

} See under sec. 206 of Dominion Act.

Provision if
the company
makes de-
fault.

208. In case of default, the proper authority in the municipality or other local division, within whose jurisdiction the said portion of the railway is situate, may make such repairs, and may recover all costs, expenses and outlays in the premises, by action against the company in any court of competent jurisdiction, as money paid to the company's use; but neither this section nor any proceeding had thereunder shall at all affect any liability otherwise attaching to such company in the premises.

R. S. O., ch. 170, sec. 67 (1).
 R. S. Q., Art. 5196.
 N. B., 1891, ch. 18, sec. 54.
 R. S. N. S., ch. 53, sec. 46. } See under sec. 206 of Dominion Act.

209. The (Minister or any inspecting engineer), (1) may (2) Regulation of limit the number (of times) (3) or rate of speed of running of speed of trains or vehicles, upon any railway or portion of railway, until trains, etc. such alterations or repairs as he thinks sufficient have been made (or until such time as he thinks prudent) ; (a) and the company owning, running or using such railway shall forthwith comply with any such order of the (Minister or an inspecting engineer), (4) upon notice thereof as aforesaid ; and for every act of non- Penalty. compliance therewith, such company shall forfeit to Her Majesty the sum of two thousand dollars.

R. S. O., ch. 170, sec. 60.—(1) "Commissioner of Public Works," (2) "with the sanction of the Lieutenant Governor in Council," (3) "or times," (4) "Inspector or of the Commissioner."

R. S. Q., Art. 5197.—(1) "Railway Committee or the inspecting engineer," (4) "Railway Committee or inspecting engineer."

N. B., 1891, ch. 18, sec. 47. Same as Ontario, excepting (a) omitted.

R. S. N. S., ch. 53, sec. 47.—(1), (2) "Governor in Council or inspecting engineer or engineer.s."

210. If, in the opinion of any (inspecting engineer), (1) it is Running of dangerous for trains or vehicles to pass over any railway, or trains may be any portion thereof, until alterations, substitutions or repairs are prohibited in made thereon, or that any particular car, carriage or locomotive should be run or used, the said (engineer) (2) may forthwith forbid the running of any train or vehicle over such railway or portion of railway, or the running or using of any such car, carriage or locomotive, by delivering or causing to be delivered to the president, managing director or secretary or superintendent of the company owning, running or using such railway, or to any officer having the management or the control of the running of trains on such railway, a notice in writing to that effect, with his reasons therefor, in which he shall distinctly point out the defects or the nature of the danger to be apprehended (and for every act of non-compliance therewith such Penalty. company shall forfeit to Her Majesty the sum of two thousand dollars). (3)

R. S. O., ch. 170, sec. 58.—(1) "Railway Inspectors," (2) "Inspector," (3) omitted.

R. S. Q., Art. 5190. Same as Dominion, excepting (3) omitted.

N. B., 1891, ch. 18, sec. 45.

R. S. N. S., ch. 53, sec. 40.—(1) "Such engineer," (3) omitted.

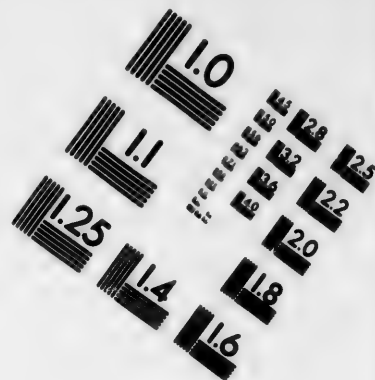
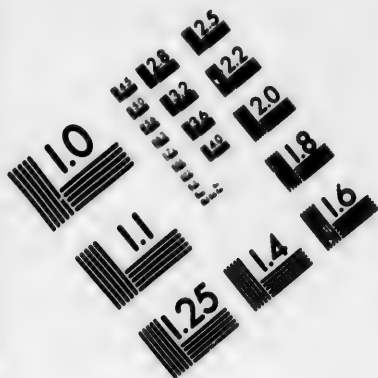
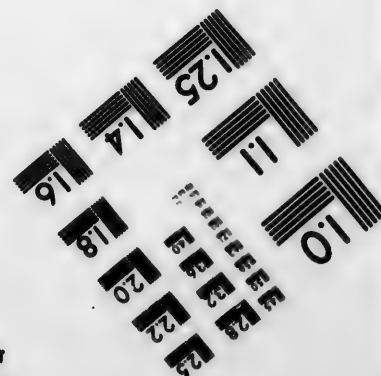
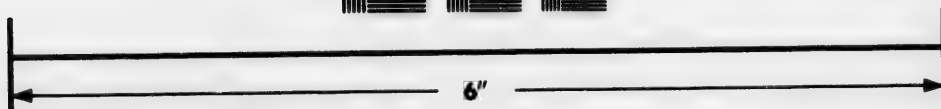
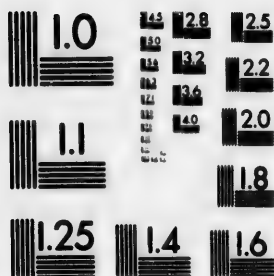


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211. The (inspecting engineer) (1) shall forthwith report the same to the (Minister), (2) who, with the sanction of the Governor in Council, may either confirm, modify or disallow the act or order of the inspecting engineer; and notice of such confirmation, modification or disallowance shall be duly given to the company affected thereby.

R. S. O., ch. 170, sec. 59.—(1) "Inspector," (2) "Commissioner of Public Works."

R. S. Q., Art. 5191.—(2) "Railway Committee."

N. B., 1891, ch. 18, sec. 46. Same as Ontario.

R. S. N. S., ch. 53, sec. 41—(2), "Governor in Council."

PROOF OF PROCEEDINGS AT MEETINGS—NOTICES.

212. Copies of the minutes of proceedings and resolutions of the shareholders of the company, at any (annual) (a) or special meeting, and of the minutes of proceedings and resolutions of the directors, at their meetings, extracted from the minute books kept by the secretary of the company, and by him certified to be true copies extracted from such minute books, shall be (1) evidence of such proceedings and resolutions in any court. (2)

R. S. O., ch. 170, sec. 40 (3). (1) "*Prima facie*," (2) "of civil jurisdiction," (a) "general."

R. S. Q., Art. 5139 (3).—Same as Dominion, excepting (a) "general."

R. S. M., ch. 130, sec. 100. Same as Ontario.

N. B., 1891, ch. 18, sec. 31 (3). Same as Ontario.

R. S. N. S., ch. 53, sec. 24 (3).—(1) "General."

213. All notices given by the secretary of the company, by order of the directors, shall be deemed notices by the directors and the company.

R. S. O., ch. 170, sec. 40 (4).

R. S. Q., Art. 5139 (4).

R. S. M., ch. 130, sec. 101.

N. B., 1891, ch. 18, sec. 31 (4).

R. S. N. S., ch. 53, sec. 24 (4).

BY-LAWS, RULES AND REGULATIONS.

214. The company may, subject to the provisions and restrictions in this and in the special Act contained, make by-laws, rules or regulations for the following purposes, that is to say:—

(a) For regulating the mode by which, and the speed at which carriages using the railway are to be moved or propelled;

(b) For regulating the hours of the arrival and departure of Time.
any such carriages ;

(c) For regulating the loading or unloading of such carriages, Loads.
and the weights which they are respectively to carry ;

(d) For regulating the receipt and delivery of goods and Goods.
other things which are to be conveyed upon such carriages ;

(e) For preventing the smoking of tobacco, and the com- Nuisances.
mission of any other nuisance in or upon such carriages, or in
any of the stations or premises occupied by the company ;

(f) For regulating the travelling upon, or the using or work- Use of rail-
ing of, the railway ; way.

(g) For regulating the conduct of the officers, servants and Conduct of
employees of the company ; and— officers, etc.

(h) For providing for the due management of the affairs of Management.
the company in all respects whatsoever.

R. S. O., ch. 170, sec. 87. Every Railway Company shall make such
by-laws, rules and regulations, to be observed by the conductors, engine
drivers, and other officers and servants of the Company, and by all other
Companies and persons using the railway of such Company, and such regula-
tions in regard to the construction of the carriages and other vehicles to be
used in the trains on the railway of the Company, as are requisite for ensur-
ing the perfect carrying into effect of the provisions of this part of this Act,
and the orders and regulations of the (Lieutenant Governor in Council). (1)

R. S. Q., Art. 5140 (1). Same as Ontario.

N. B., 1891, ch. 18, sec. 68. Same as Ontario.

R. S. N. S., ch. 53, sec. 60 (1). Same as Ontario.

215. The company may, for better enforcing the observ- Penalty for
ance of any such by-law, rule or regulation, thereby prescribe a violation of
penalty not exceeding forty dollars for any violation thereof. by-laws.

R. S. O., ch. 170, sec. 88. "Any Railway Company may, by a by-law,
impose upon any officer, person or servant, who, before the contravention of
such by-law, has had notice thereof, and is employed by the company, a
forfeiture to the company of not less than thirty days' pay of such officer or
servant, for any contravention of such by-laws, and may retain such forfeiture
out of the salary or wages of the offender."

R. S. Q., Art. 5141. Same as sec. 88 of Ontario.

R. S. Q., Art. 5140 (4). "Any of the conductors, engine-drivers, and
other officers and servants of the company or other railway companies using
any railway offending against any such by-law, shall forfeit, for every such
offence, a sum not exceeding \$40; such forfeiture to be imposed by the com-
pany in such by-law, as a penalty for every such offence."

R. S. Q., Art. 5140 (5). "If the infraction or non-observance of any such
by-law, by any of the classes in the next preceding paragraph mentioned, be
attended with danger or annoyance to the public, or hindrance to the com-
pany in the lawful use of the railway, it shall be lawful for the company

summarily to interfere, using no violence or unnecessary force, to obviate or remove such danger, annoyance or hindrance, and that without prejudice to any penalty incurred by the infraction of any such by-law."

R. S. N. S., ch. 53, sec. 60 (4). Same as Quebec. Secs. 5140 (4), 5140 (5).

Form of by-laws.

216. All by-laws, rules and regulations of the company shall be reduced to writing, be signed by the chairman or person presiding at the meeting at which they are adopted (have affixed thereto the common seal of the company), (1) and be kept in the office of the company.

R. S. O., ch. 170, sec. 40 (1).—(1) omitted.

R. S. Q., Art. 5139 (1). Same as Dominion.

R. S. Q., Art. 5140 (3). Same as Dominion.

R. S. M., ch. 130, sec. 98. Same as Ontario.

N. B., 1891, ch. 18, sec. 31. Same as Ontario.

R. S. N. S., ch. 53, sec. 60 (3), sec. 24 (1).—(1) omitted.

Sanction.

217. All such by-laws, rules and regulations shall be submitted from time to time to the (Governor in Council) (1) for approval (and no such by-laws, rule or regulation shall have any force or effect until it is approved by the Governor in Council). (2)

R. S. O., ch. 170, sec. 40 (2).—(1) "Lieutenant Governor in Council," (2) omitted.

R. S. Q., Art. 5139 (2). Same as Ontario.

R. S. Q., Art. 5140 (6). Same as Ontario.

R. S. M., ch. 130, sec. 99. Same as Ontario.

N. B., 1891, ch. 18, sec. 31 (2). Same as Ontario.

R. S. N. S., ch. 53, sec. 24 (2). Same as Dominion, excepting (2) omitted.

Publication.

218. A printed copy of so much of any by-law, rule or regulation as affects any person other than the (shareholders or the officers, servants or employees) (1) of the company, shall be openly affixed (and kept affixed to a conspicuous part of every station belonging to the company, and so as to give public notice thereof to the persons interested therein or affected thereby; and in the Province of Quebec such notice shall be published both in the English and French languages). (2)

R. S. O., ch. 170, sec. 40 (1).—(1) "members or servants," (2) substitute "in all and every passenger car, and in all and every place where tolls are to be gathered, and in like manner so often as any change or alteration is made in the same."

R. S. Q., Art. 5139 (1). Same as Ontario, sec. 40 (1).

R. S. M., ch. 170, sec. 98. Same as Ontario, sec. 40 (1).

N. B., 1891, ch. 18, sec. 31.

R. S. Q., Art. 5140 (7). "The substance of any such by-law, when approved as aforesaid, if it affect any officer or servant of the company, may be proved by proving the delivery of a copy to or its receipt by such officer or servant, and if it affect any other railway company using the railway, it shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject matter of such by-laws respectively, and so as to give public notice thereof to the persons interested therein or affected thereby."

"Such boards shall be from time to time renewed as often as the by-laws thereon or any part thereof shall be obliterated or destroyed."

"No penalty imposed by any such by-laws shall be recoverable unless the same shall have been published and kept published in manner aforesaid."

R. S. N. S., ch. 53, sec. 24 (1). Same as Ontario.

219. A printed copy of so much of any by-law, rule or order as relates to the conduct of or affects the officers, servants or employees of the company, shall be given to every officer, servant and employee of the company thereby affected; and in the Province of Quebec such notice shall be published both in the English and French languages.

R. S. O., ch. 170, sec. 89. The notice of the by-law, or of any order or notice of the (Commissioner of Public Works) (1) may be proved by proving the delivery of a copy thereof to the officer, servant, or person, or that he has signed a copy thereof, or that a copy thereof was posted in some place where his work or his duties, or some of them, were to be performed.

R. S. Q., Art. 5142. Same as Ontario, excepting (1) "Railway Committee or Inspecting Engineer".

N. B., 1891, ch. 18, sec. 69. Same as Ontario.

R. S. N. S., ch. 53, sec. 52. Same as Ontario, excepting (1) "Governor-in-Council or Inspecting Engineer or Engineers."

220. Such by-laws, rules and regulations, when so confirmed, shall be binding upon and observed by all persons, (1) and shall be sufficient to justify all persons acting thereunder.

R. S. Q., Art. 5140 (8).—(1) "mentioned in the fourth paragraph of this article."

221. If the violation or non-observance of any such by-law (1) (rule or regulation) (2) is attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company may summarily interfere, (3) to obviate or remove such danger, annoyance or hindrance, and without prejudice to any penalty incurred by the violation of such by-law, rule or regulation.

R. S. Q., Art. 5140 (5).—(1) "by any of the classes in the next preceding paragraph mentioned," (2) omitted, (3) "using no violence or unnecessary force."

Certified copy to be evidence. **222.** A copy of any by-law, rule or regulation certified as correct by the president or secretary of the company shall be evidence thereof in any court.

R. S. O. }
 R. S. Q. } See under sec. 219 *supra*.
 N. B. }
 R. S. N. S. }

TOLLS.

Tolls, how fixed.

223. Subject to the provisions and restrictions in this and in the special Act contained, the company may, by by-laws, or the directors, if thereunto authorized by the by-laws, may, from time to time, fix and regulate the tolls to be demanded and taken for all passengers and goods transported upon the railway, or in steam vessels belonging to the company.

R. S. O., ch. 170, sec. 31 (1). "Tolls shall be from time to time fixed and regulated by the by-laws of the company, or by the directors, if thereunto authorized by the by-laws, or by the shareholders at any general meeting, and may be demanded and received for all passengers and goods transported upon the railway, or in the steam vessels to the undertaking belonging, and shall be paid to such persons and at such places near to the railway, in such manner and under such regulations as the by-laws direct."

R. S. Q., Art. 5172 (1). Same as Ontario.

R. S. M., ch. 130, sec. 39. Same as Ontario.

N. B., 1891, ch. 18, sec. 22

R. S. N. S., ch. 53, sec. 1; 1). Same as Ontario.

No discrimination to be made.

224. Such tolls may be fixed either for the whole or for any particular portions of the railway; but all such tolls shall always, under the same circumstances, be charged equally to all persons, and at the same rate, whether per ton, per mile or otherwise, in respect of all passengers and goods and railway carriages of the same description, and conveyed or propelled by a like railway carriage or engine, passing only over the same portion of the line of railway; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person travelling upon or using the railway.

R. S. O., ch. 170, sec. 31 (6). All or any of the tolls may by by-law be reduced and again raised as often as deemed necessary for the interests of the undertaking, but the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-laws relating to the tolls.

R. S. Q., Art. 5172 (6). Same as Ontario.

R. S. M., ch. 130, sec. 44. Same as Ontario.

N. B., 1891, ch. 18, sec. 23 (6). Same as Ontario.

R. S. N. S., ch. 53, sec. 17 (6). Same as Ontario.

225. The tolls fixed for large quantities or long distances may be proportionately less than the tolls fixed for small quantities or short distances, if such tolls are, under the same circumstances, charged equally to all persons; but in respect of quantity, no special toll or rate shall be given or fixed for any quantity less than one car load of at least ten tons. Special rates.

226. The company, in fixing or regulating the tolls to be demanded and taken for the transportation of goods, shall, except in respect to through traffic to or from the United States, adopt and conform to any uniform classification of freight which the Governor in Council on the report of the Minister, from time to time, prescribes. Classification of freight.

227. No tolls shall be levied or taken until the by-law fixing such tolls has been approved of by the (1) Governor in Council, nor until after two weekly publications in the (*Canada*) (2) *Gazette* of such by-law and of the Order in Council approving thereof (nor shall any company levy or collect any money for tolls for services as a common carrier except subject to the provisions of this Act). (3) Tolls to be approved by Governor in Council.

R. S. O., ch. 170, sec. 31 (9).—(1) "Lieutenant," (2) "Ontario," (3) omitted.

R. S. Q., Art. 5172 (9).—(1) "Lieutenant," (2) "Quebec," (3) omitted.

R. S. M., ch. 130, sec. 47.—(1) "Lieutenant," (2) "Manitoba," (3) omitted.

N. B., 1891, ch. 18, sec. 23 (9).—(1) "Lieutenant," (2) "Royal," (3) omitted.

R. S. N. S., ch. 53, sec. 17 (9). Same as N.B.

228. Every by-law fixing and regulating tolls shall be subject to revision by the (1) Governor in Council, from time to time, after approval thereof; and after an Order in Council (altering) (a) the tolls fixed and regulated by any by-law, has been twice published in the (*Canada*) (2) *Gazette*, the tolls mentioned in such Order in Council shall be substituted for those mentioned in the by-law, so long as the Order in Council remains unrevoked. Revision of by-law fixing tolls.

R. S. O., ch. 170, sec. 31 (10).—(1) "Lieutenant," (2) "Ontario," (a) "reducing."

R. S. O., ch. 170, sec. 31 (11). The Legislature may from time to time reduce the tolls upon the railway, but not without the consent of the Company, so as to produce less than fifteen per cent. per annum profit on the capital actually expended in its construction, nor unless, on an examination made by

the Chief Commissioner of Public Works of the amount received and expended by the Company, the net income from all sources for the year then last past is found to have exceeded fifteen per cent. upon the capital so actually expended.

R. S. O., ch. 170, sec. 31 (12). The by-laws of every Railway Company, heretofore or hereafter incorporated, regulating the tolls to be taken on such road, in the special Act respecting which a provision has been inserted, that such railway should be subject to the provisions of any general Act relating to railways, shall be subject to the approval of the Lieutenant Governor in Council; and no by-law of any Railway Company in this Province, by which tolls are to be imposed or altered, or by which any party, other than the members, officers and servants of the Company, are intended to be bound, shall have any force or effect until the same has been approved and sanctioned by the Lieutenant Governor in Council.

R. S. Q., Art. 5172 (10).—(1) "Lieutenant," (a) "reducing," (2) "Quebec."

R. S. Q., Art. 5172 (11). Same as Ontario, sec. 31 (11).

R. S. Q., Art. 5172 (12). "No by-law of any railway company, by which any tolls are to be imposed or altered, or by which any person, other than the members, officers and servants of the company, are intended to be bound, shall have any force or effect until the same has been approved and sanctioned by the Lieutenant Governor in Council."

R. S. M., ch. 130, sec. 48.—(1) "Lieutenant," (a) "reducing," (2) "Manitoba."

R. S. M., ch. 130, sec. 49. Same as Ontario, sec. 31 (12).

N. B., 1891, ch. 18, sec. 23 (10).—(1) "Lieutenant," (a) "reducing," (2) "Royal."

N. B., 1891, ch. 18, sec. 23 (11). Same as Ontario, sec. 31 (11).

N. B., 1891, ch. 18, sec. 23 (12). Same as Ontario, sec. 31 (12).

R. S. N. S., ch. 53, sec. 17 (10). Same as Ontario, sec. 31 (10), excepting (2) "Royal."

Fractions,
how estimated.

229. In all cases, a fraction in the distance over which goods or passengers are transported on the railway shall be considered as a whole mile; and for a fraction of a ton in the weight of any goods, a proportion of the tolls shall be demanded and taken (according to the number of quarters of a ton contained therein, and a fraction of a quarter of a ton shall be deemed and considered as a whole quarter of a ton). (1)

R. S. O., ch. 170, sec. 31 (7).

R. S. Q., Art. 5172 (7).

R. S. M., ch. 130, sec. 45.

N. B., 1891, ch. 18, sec. 23 (7). (1) substitute "but no fraction of a ton shall be deemed or considered to be less than one hundred pounds avoirdupois."

R. S. N. S., ch. 53, sec. 17 (7). Same as Dominion.

Tariff to be
posted up.

230. The (company) (1) shall, from time to time, cause to be printed and posted up in its offices, and in every place where the tolls are to be collected (in some conspicuous position), (2) a printed board or paper, exhibiting (a) all the rates of tolls

payable, and particularizing the price or sum of money to be charged or taken for the carriage of any matter or thing.

R. S. O., ch. 170, sec. 31 (8).—(1) "directors," (2) "and in every passenger car, in some conspicuous place there."

R. S. Q., Art. 5172 (8). (1) "directors," (a) "in French and English."

R. S. M., ch. 130, sec. 46. Same as Ontario.

N. B., 1891, ch. 18, sec. 23 (8).—(1) "directors,"

R. S. N. S., ch. 53, sec. 17 (8).—(1) "directors,"

231. Such tolls shall be paid to such persons and at such places, near to the railway, in such manner and under such regulations as the by-laws direct. ^{Tolls, to whom payable.}

R. S. O.

R. S. Q.

R. S. M.

N. B.

R. S. N. S.

See under sec. 224 *supra* of Dominion Act.

232. No company, in fixing any toll or rate, shall, under like conditions and circumstances, make any unjust or partial discrimination between different localities; but no discrimination between localities, which, by reason of competition by water or railway, it is necessary to make to secure traffic, shall be deemed to be unjust or partial. ^{When allowable.}

233. No company shall make or give any secret special toll, rate, rebate, drawback or concession to any person; and every company shall, on the demand of any person, make known to him any special rate, rebate, drawback or concession, given to anyone. ^{No secret special rates to be given.}

234. In case of denial or neglect of payment on demand of any such tolls, or any part thereof, the same shall be recoverable in any court of competent jurisdiction; or the agents or servants of the company may seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof, and in the meantime the said goods shall be at the risk of the owners thereof. ^{Enforcement of payment of tolls.}

R. S. O., ch. 170, sec. 31 (2).

R. S. Q., Art. 5172 (2).

R. S. M., ch. 130, sec. 40.

N. B., 1891, ch. 18, sec. 23 (2).

R. S. N. S., ch. 53, sec. 17 (2).

Sale of goods
in default of
payment.

235. If the tolls are not paid within six weeks, the company may sell (a) the whole or any part of such goods, and out of the money arising from such sale retain the tolls payable, and all (reasonable) (1) charges and expenses of such seizure, detention and sale, and shall deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto. (2)

R. S. O., ch. 170, sec. 31 (3).—(1) omitted.

R. S. Q., Art. 5172 (3).—(1) omitted.

R. S. M., ch. 130, sec. 41.—(1) omitted.

N. B., 1891, ch. 18, sec. 23 (3). (a) "By public auction, after six days public notice," (1) omitted, (2) but in case of perishable goods the same may be sold before the expiration of six weeks, and upon reasonable notice."

R. S. N. S., ch. 53, sec. 17 (3).—Same as Dominion, excepting (b) "on publishing an advertisement of such sale for one week in any newspaper, published nearest to the station where the tolls are payable," (1) omitted.

Sale of un-
claimed
goods.

236. If any goods remain in the possession of the company unclaimed for the space of twelve months, the company may thereafter, and on giving public notice thereof by advertisement, for six weeks, in the (*Official Gazette* of the Province in which such goods are) (1) (and in such other newspapers as it deems necessary) (2) sell such goods by public auction, at a time and place which shall be mentioned in such advertisement, and, out of the proceeds thereof, pay such tolls and all reasonable charges for storing, advertising and selling such goods; and the balance of the proceeds, if any, shall be kept by the company for a further period of three months, to be paid over to any person entitled thereto.

R. S. O., ch. 170, sec. 31 (4).—(1) "Ontario."

R. S. Q., Art. 5172 (4).—(2) omitted.

R. S. M., ch. 130, sec. 42.—(1) "*Manitoba Gazette*,"

N. B., 1891, ch. 18, sec. 23 (4).—(1) "*Royal Gazette*."

R. S. N. S., ch. 53, sec. 17 (4). Same as N.B.

Disposal of
unclaimed
balance.

237. In default of such balance being claimed before the expiration of the period last aforesaid, the same shall be paid over to the (Minister of Finance and Receiver General for the public uses of Canada) (1) until claimed by the person entitled thereto.

R. S. O., ch. 170, sec. 31 (5).—(1) "Provincial Treasurer to be applied to the general purposes of the Province."

R. S. Q., Art. 5172 (5). Same as Ontario.

R. S. M., ch. 130, sec. 43. Same as Ontario.

N. B., 1891, ch. 18, sec. 23 (5).—(1) "Receiver General to be applied to the general purposes of the Province."

R. S. N. S., ch. 53, sec. 17 (5). Same as Ontario.

TRAFFIC ARRANGEMENTS.

238. The directors of any company may, at any time, make and enter into any agreement or arrangement with any other company, either in (Canada) (1) or elsewhere, for the regulation and interchange of traffic passing to and from the company's railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately,—and for the division and apportionments of tolls, rates and charges in respect of such traffic,—and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding (twenty-one years),—(a) and to provide, either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect of any such agreement or arrangement, with such powers and functions as are considered necessary or expedient,—subject to the consent of two-thirds of the stock-holders voting in person or by proxy (and also to the approval of the Governor in Council). (2)

Arrange-
ments for in-
terchange of
traffic.

Proviso: as to
approval.

R. S. O., ch. 170, sec. 77.—(1) "This Province," (2) substitute "but the provisions of this section shall not apply to anything done before the 30th day of June, 1858."

R. S. Q., Art. 5207.—(1) "in the Province," (a) "fifty years," (2) omitted.

N. B., 1891, ch. 18, sec. 64.—(1) "in this Province," (2) omitted.

R. S. N. S., ch. 53, sec. 58 (1). Same as Dominion, excepting (2) omitted.

239. Before such approval is given, notice of the application therefor shall be published in the *Canada Gazette* for at least two months previously to the time therein named for the making of such application; and such notice shall state a time and place when the application is to be made, and that all persons interested may then and there appear and be heard on such application.

Notice of ap-
plication for
approval.

240. Every company shall, according to its power, afford all reasonable facilities to any other railway company for the receiving and forwarding and delivery of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any

Facilities to
be afforded in
respect of
traffic.

No undue ad-
vantage.

As to continuous lines of railway.

particular person or company, or any particular description of traffic in any respect whatsoever,—nor shall any such company subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every company which has or works a railway which forms part of a continuous line of railway, (a) or which intersects any other railway, or which has any terminus, station or wharf near to any terminus, station or wharf of any other railway, shall afford all due and reasonable facilities for receiving and forwarding by its railway all the traffic arriving by such other railway, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction is offered (to the public desirous of) (1) using such railway as a continuous line of communication, and so that all reasonable accommodation (by means of the railways of the several companies) (2) is, at all times, afforded (to the public in that behalf), (3) and any agreement made between any two or more companies contrary to this section (4) shall be unlawful, and null and void.

Agreements in violation void.

R. S. O., ch. 170, sec. 78 (1).—(1) “in the,” (2) omitted, (3) “by and to the several railway companies.”

R. S. O., ch. 170, sec. 78 (2).—(4) “made since the 18th day of May, 1861, or after the passing of this Act.”

R. S. Q., Art. 5207 (2).—(1) “in the,” (2) omitted, (3) “by and to the several railway companies.”

N. B., 1891, ch. 18, sec. 65. Same as Quebec.

R. S. N. S., ch. 53, sec. 58 (2).—(a) “or railway and steamer connection.”

Penalty for refusal by officer to receive and convey goods.

241. Every officer, servant or agent of any company, having the superintendence of the traffic at any station or depot thereof, who refuses or neglects to receive, convey or deliver at any station or depot of the company for which they are destined, any passenger, goods or thing, brought, conveyed or delivered to him or such company, for conveyance over or along its railway from that of any other company, intersecting or being near to such first mentioned railway, or who in any way wilfully violates the provisions of the next preceding section, and the company first mentioned are, for each such refusal, neglect or offence, severally liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the actual damages sus-

tained; which penalty shall be recoverable with costs, (1) by the railway company or by any person aggrieved by such neglect or refusal, and such penalty shall belong to the said railway company, or other person so aggrieved. Recovery and application.

R. S. O., ch. 170, sec. 79.—(1) "In a summary way before any Justice of the Peace."

R. S. Q., Art. 5207 (4). Same as Ontario.

N. B., 1891, ch. 18, sec. 66. Same as Ontario.

R. S. N. S., ch. 53, sec. 58 (4). Same as Ontario.

242. Every company which grants any facilities to any incorporated express company or person shall grant equal facilities on equal terms and conditions to any other incorporated express company which demands the same. Equal facilities to express companies,

R. S. N. S., ch. 53, sec. 58 (3).

WORKING OF THE RAILWAY.

243. Every railway company, which runs trains upon the railway for the conveyance of passengers, shall provide and cause to be used in and upon such trains such known apparatus and arrangements as best afford good and sufficient means of immediate communication between the conductors and the engine drivers of such trains while the trains are in motion,—and good and sufficient means of applying, by the power of the steam engine or otherwise, at the will of the engine driver or other person appointed to such duty, the brakes to the wheels of the locomotive or tender, or both, or of all or any of the cars or carriages composing the trains, and of disconnecting the locomotive, tender and cars or carriages from each other by any such power or means,—and also such apparatus and arrangements as best and most securely place and fix the seats or chairs in the cars or carriages,—and shall alter such apparatus and arrangements, or supply new apparatus and arrangements, from time to time, as the (Railway Committee) (1) orders; and every railway company which fails to comply with any of the provisions of this section shall forfeit to Her Majesty a sum not exceeding two hundred dollars for every day during which such default continues (and shall, as well, be liable to pay to all such persons as are injured by reason of non-compliance with these provisions, or to their representatives, such damages as they are legally entitled to, notwithstanding any agreement to the contrary with regard to any such person). (2) Best appliances for communication and for stopping trains to be used.

Penalty for non-compliance.

Liability for damages.

R. S. O., ch. 170, sec. 96.—(1) "Commissioner of Public Works with the sanction of the Lieutenant Governor in Council may order."

R. S. O., ch. 170, sec. 97.—(2) omitted.

R. S. Q., Art. 5149 Same as Dominion, excepting (2) omitted.

N. B., 1891, ch. 18, secs. 76 and 77. Same as Ontario.

R. S. N. S., ch. 53, secs. 69, 70.—(1) "Governor in Council."

Bells and whistles.

244. Every locomotive engine shall be furnished with a bell, of at least thirty pounds weight, and with a steam whistle.

R. S. O., ch. 170, sec. 41 (8).

R. S. Q., Art. 5173 (9).

R. S. M., ch. 130, sec. 110.

N. B., 1891, ch. 18, sec. 32 (8).

R. S. N. S., ch. 53, sec. 25 (8).

Position of passenger cars.

245. No baggage, freight, merchandise or lumber cars shall be placed in rear of the passenger cars. (1)

R. S. O., ch. 170, sec. 41 (7).—(1) "and no officer or agent shall direct or knowingly suffer such arrangement."

R. S. Q., Art. 5173 (8). Same as Dominion.

R. S. M., ch. 130, sec. 109. Same as Ontario.

N. B., 1891, ch. 18, sec. 32 (7). Same as Ontario.

R. S. N. S., ch. 53, sec. 25 (7). Same as Ontario, and additional "under penalty of being found guilty of a misdemeanor and punished accordingly."

Trains to be run at regular hours.

246. All (regular) (1) trains shall be started and run (as near as practicable) (2) at regular hours, fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously thereto offered for transportation at the place of starting, and at the junctions of other railways and at usual stopping places established for receiving and discharging way passengers and goods from the trains ;

R. S. O., ch. 170, sec. 41 (2).—(1) omitted, (2) omitted.

R. S. Q., Art. 5173 (2). Same as Ontario.

R. S. M., ch. 130, sec. 104.

N. B., 1891, ch. 18, sec. 32 (2).

R. S. N. S., ch. 53, sec. 25 (2). Same as Ontario.

Conveyance of passengers and goods.

2. Such passengers and goods shall be taken, transported to and from, and discharged at such places, on the due payment of the toll, freight or fare lawfully payable therefor ;

R. S. O., ch. 170, sec. 41 (3).

R. S. Q., Art. 5173 (3).

R. S. M., ch. 130, sec. 105.

N. B., 1891, ch. 18, sec. 32 (3).

R. S. N. S., ch. 53, sec. 25 (3).

3. Every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission (1) of the company or of its servant.

R. S. O., ch. 170, sec. 41 (4).—(1) "or misconduct."

R. S. Q., Art. 5173 (4).

R. S. M., ch. 130, sec. 106.—(1) "or misconduct."

N. B., 1891, ch. 18, sec. 32 (4).—(1) "or misconduct."

R. S. N. S., ch. 55, sec. 25 (4).

247. Every servant of the (company) (1) employed in a passenger train or at a station for passengers, shall wear upon his hat or cap a badge, which shall indicate his office, and he shall not, without such badge, be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, or to interfere with any passenger or his baggage or property.

R. S. O., ch. 170, sec. 41 (1).—(1) "undertaking."

R. S. Q., Art. 5173 (1).—(1) "undertaking."

R. S. M., ch. 130, sec. 103.—(1) "undertaking."

N. B., 1891, ch. 18, sec. 32.—(1) "undertaking."

R. S. N. S., ch. 53, sec. 25 (1).—(1) "undertaking."

248. Every passenger who refuses to pay his fare may, by the conductor of the train and the (train) (1) servants of the company, be put out of the train, with his baggage, at any usual stopping place, or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force.

R. S. O., ch. 170, sec. 41 (10).—(1) omitted.

R. S. Q., Art. 5173 (12).—(1) omitted.

R. S. M., ch. 130, sec. 112.—(1) omitted.

N. B., 1891, ch. 18, sec. 32 (10).—(1) omitted.

R. S. N. S., ch. 53, sec. 25 (11).—(1) omitted.

249. No person injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations posted up at the time, (1) shall have any claim in respect of the injury, if room inside of such passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time.

R. S. O., ch. 170, sec. 41 (11).—(1) "in a conspicuous place inside of the passenger cars then in the train."

R. S. Q., Art. 5173 (13). Same as Ontario.

R. S. M., ch. 130, sec. 113. Same as Ontario.

N. B., 1891, ch. 18, sec. 32 (11). Same as Ontario, adding after train "or on the outside of the door."

R. S. N. S., ch. 53, sec. 25 (12). Same as Ontario.

Checks to be
affixed to
baggage.

250. Checks shall be affixed by an agent or servant to every parcel of baggage having a handle, loop or fixture of any kind thereupon (delivered to such agent or servant for transport), (1) and a duplicate of such check shall be given to the passenger delivering the same.

R. S. O., ch. 170, sec. (5).—(1) omitted.
R. S. Q., Art. 5173 (5).—(1) omitted.
R. S. M., ch. 130, sec. 107.—(1) omitted.
N. B., 1891, ch. 18, sec. 32 (5).
R. S. N. S., ch. 53, sec. 25 (5).—(1) omitted.

Penalty for
refusing to
affix check.

251. If such check is refused on demand, the company shall pay to such passenger the sum of (eight dollars), (1) which shall be recoverable in a civil action; and no fare or toll shall be collected or received from such passenger, and if he has paid his fare, the same shall be refunded by the conductor in charge of the train.

R. S. O., ch. 170, sec. 41 (6).
R. S. Q., Art. 5173 (6).
R. S. M., ch. 130, sec. 108.
N. B., 1891, ch. 18, sec. 32 (6).—(1) "ten."
R. S. N. S., ch. 53, sec. 25 (6).

Evidence of
value of bag-
gage.

252. Any passenger who produces such check may himself be a witness in any action or suit brought by him against the company to prove the contents and value of his baggage not delivered to him.

R. S. Q., Art. 5173 (7).

As to danger-
ous goods.

253. No passenger shall carry, or require the company to carry upon its railway, aquafortis or oil of vitriol, gunpowder (nitro-glycerine) (1) or any other goods which, in the judgment of the company, are of a dangerous nature; and every person who sends by the railway any such goods without, at the time of so sending the same, distinctly marking their nature on the outside of the package containing the same, and otherwise giving notice in writing to the (station master) (2) or other servant of the company with whom the same are left (or who carries or takes upon any railway train such material as is mentioned above, for the purpose of having the same carried by the said railway train), (3) shall forfeit to the company the sum of (five hundred dollars) (4) for every such offence.

To be plainly
marked.

Penalty for
contravention.

R. S. O., ch. 170, sec. 41 (12).—(1) "Lucifer matches," (2) "book-keeper," (3) omitted, (4) "twenty dollars."

R. S. Q., Art. 5173 (14).—(3) omitted.

R. S. M., ch. 130, sec. 114. Same as Ontario.

N. B., 1891, ch. 18, sec. 32 (12). Same as Dominion.

R. S. N. S., ch. 53, sec. 25 (13)—(3) omitted.

254. The company may refuse to take any package or parcel which it suspects to contain goods of a dangerous nature, or may require the same to be opened to ascertain the fact (and the company shall not carry any such goods of a dangerous nature, except in cars specially designated for that purpose, on each side of each of which shall plainly appear, in large letters, the words "dangerous explosives;" and for each neglect to comply with the provisions of this section, the company shall incur a penalty of five hundred dollars). (1)

Dangerous goods may be refused.

Carriage of such goods.

Penalty for contravention.

R. S. O., ch. 170, sec. 41 (13).—(1) omitted.

R. S. Q., Art. 5173 (15).—(1) omitted.

R. S. M., ch. 130, sec. 115.—(1) omitted.

N. B., 1891, ch. 18, sec. 32 (13). Same as Dominion.

R. S. N. S., ch. 53, sec. 25 (14)—(1) omitted.

255. (*As amended by 55-56 Vic., ch. 27, sec. 7.*) When a railway passes any draw or swing bridge over a navigable river, canal or stream, which is subject to be opened for the purposes of navigation, the trains shall, in every case, be stopped at least (one minute) (1) to ascertain from the bridge tender that the said bridge is closed and in perfect order for passing; and in default of so stopping for the full period of (one minute) (2) the company shall incur a penalty of four hundred dollars;

Train to stop before passing a swing bridge

2. "Wherever there is adopted or in use on any railway at any such bridge an interlocking switch and signal system, or other device which, in the opinion of the Railway Committee, renders it safe to permit engines and trains to pass over such bridge without being brought to a stop, the said Committee may, by an order in writing, give permission for engines and trains to pass over such bridge without stopping, under such regulations, as to speed and other matters, as the said Committee deem proper; and the said Committee may at any time modify or revoke such order."

Exception in case of interlocking switches.

R. S. O., ch. 170, sec. 95.—(1) "three minutes," (2) "three minutes," 2nd part of Dominion Act omitted.

R. S. Q., Art. 5148. Same as Ontario.

N. B., 1891, ch. 18, sec. 75. Same as Ontario.

R. S. N. S., ch. 53, sec. 68.

Bells to be rung or whistle sounded at crossings.

Penalty for non-compliance.

256. The bell, with which the engine is furnished, shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals, until the engine has crossed such highway; and the company shall, for each neglect to comply with the provisions of this section, incur a penalty of eight dollars, and shall also be liable for all damage sustained by any person by reason of such neglect; and a moiety of such penalty and damages shall be chargeable to and collected by the company from the engineer who has charge of such engine, and who neglects to sound the whistle or ring the bell as aforesaid.

R. S. O., ch. 170, sec. 41 (9).
R. S. Q., Art. 5173 (10).
N. B., 1891, ch. 18, sec. 32 (9).
R. S. M., ch. 130, sec. 111.
R. S. N. S., ch. 53, sec. 25 ().

Person to be stationed at crossing.

Electric railway crossings.

Interpretation and application.

257. (*As amended by 56 Vic., ch. 27, sec. 2.*) A person shall be stationed at every point where two main lines of railway cross each other at rail level, and no train shall proceed over such crossing until signal has been made to the conductor or engineer thereof that the way is clear; provided always, that in the case of an electric street railway car crossing an electric street railway track, it shall be the duty of the conductor before crossing to go forward and see that the track to be crossed is clear, before giving the signal to the motor man that the way is clear and to proceed;

2. "Every main track of a branch line is a main line within the meaning of this section, which shall apply whether the said lines be owned by different companies or by the same company."

R. S. O., ch. 170, sec. 98. "Every railway company shall station an officer at every point on their line crossed on a level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof that the way is clear."

R. S. Q., Art. 5151. Same as Ontario.
N. B., 1891, ch. 18, sec. 78. Same as Ontario.
R. S. N. S., ch. 53, sec. 71.

Trains to stop at crossing.

258. (*As amended by 56 Vic., ch. 27, sec. 2.*) "Every locomotive or railway engine, or train of cars, on any railway, shall, before it proceeds over any such crossing, as in the next preceding section mentioned, be stopped for the space of at least

one minute ; but whenever there is in use at any such crossing an Exception.
interlocking switch and signal system, or other device which, in
the opinion of the Railway Committee, renders it safe to permit
engines and trains to pass over such crossing without being
brought to a stop, the Railway Committee may, by an order in
writing, give permission for engines and trains to pass over such
crossing without stopping, under such regulations as to speed and
other matters as the Railway Committee deems proper."

R. S. O., ch. 170, sec. 99. "Every locomotive or railway engine or train
of cars, on any railway, shall, before it crosses the track of any other railway
on a level, be stopped for the space of at least (three minutes)." (1)

R. S. Q., Art. 5152. Same as Ontario, excepting (1) "one minute."

N. B., 1891, ch. 18, sec. 79. Same as Ontario.

R. S. N. S., ch. 53, sec. 72. Same as Quebec.

259. (*As amended by 55-56 Vic., ch. 27, sec. 8.*) No loco- Rate of speed
motive or railway shall pass in or through any thickly peopled in cities, etc.
portion of any city, town or village, at a speed greater than six
miles an hour, unless the track is (fenced in the manner pre-
scribed by this Act). (1)

R. S. O., ch. 170, sec. 100.—(1) "is properly fenced."

R. S. Q., Art. 5153. Same as Ontario.

N. B., 1891, ch. 18, sec. 80. Same as Ontario.

R. S. N. S., ch. 53, sec. 73. Same as Ontario.

260. (*As amended by 55-56 Vic., ch. 27, sec. 9.*) Whenever As to train
any train of cars is moving reversely in any city, town or village, moving re-
the locomotive (and tender) (1) being in the rear of such train, versely.
the company shall station on the last car in the train a person
who shall warn persons standing on or crossing the track of such
railway, of the approach of such (engine, tender and) (2) train ; Penalty.
and for every violation of any of the provisions of this section,
or of any of the three sections next preceding, the company shall
incur a penalty of one hundred dollars."

R. S. O., ch. 170, sec. 101.—(1) omitted, (2) omitted.

R. S. Q., Art. 5154. Same as Ontario.

N. B., 1891, ch. 18, sec. 81. Same as Ontario.

R. S. N. S., ch. 53, sec. 74.

261. Whenever any railway crosses any public highway at Cars not to
rail level, the company shall not, nor shall its officers, servants stand on rail-
or agents, wilfully permit any engine, tender or car, or any por- way crossing.
tion thereof, to stand on any part of such highway for a longer
period than five minutes at one time ;

Penalty for violation.

2. In every case of a violation of this section, every such officer, servant and agent who has under or subject to his control, management or direction, any engine, tender or car which, or any portion of which, is wilfully allowed to stand on such highway longer than the time specified in this section, is, and such company is also, for each such violation, liable on summary conviction to a penalty not exceeding fifty dollars: Provided always, that if such alleged violation is, in the opinion of the court, excusable, the action for the penalty may be dismissed, but without costs.

Proviso.

Application.

262. This section shall apply to every railway and railway company within the legislative authority or jurisdiction of (the Parliament of Canada); (a)

Interpretation of terms.

2. In this section the expression "packing" means a packing of wood or metal, or some other equally substantial and solid material, of not less than two inches in thickness, and which, where by this section any space is required to be filled in, shall extend to within one and a-half inches of the crown of the rails in use on any such railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid;

Packing of frogs, etc.

3. The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail;

And of wing and guard rails.

4. The spaces between any wing rail and any railway frog, and between any guard rail and the track rail alongside of it, shall be filled with packing at their splayed ends, so that the whole splay shall be so filled where the width of the space between the rails is less than five inches; such packing not to reach higher than to the under side of the head of the rail: Provided, however, that the (Railway Committee) (1) may allow such filling to be left out, from the month of December to the month of April in each year, both months included;

Proviso.

Oil cups.

5. The oil cups or other appliances used for oiling the valves of every locomotive in use upon any railway shall be such that no employee shall be required to go outside the cab of the locomotive.

tive, while the same is in motion, for the purpose of oiling such valves.

N. B., 1891, ch. 18, sec. 85. Same as Dominion, excepting (1) "Chief Commissioner of Public Works," (2) "this Province."
R. S. O., ch. 212, secs. 5, 6. "The Railway Accident Act."

TRAINS OVERDUE.

263. Every company, upon whose road there is a telegraph line in operation, shall have a blackboard put upon the outside of the station house, over the platform of the station, in some conspicuous place at each station of such company at which there is a telegraph office; and when any passenger train is overdue for half an hour at any such station, according to the time table of such company, the station master or person in charge at such station shall write, or cause to be written, with white chalk on such blackboard, a notice in English and French (in the Province of Quebec, and in English in the other Provinces), (1) stating, to the best of his knowledge and belief, the time when such overdue train may be expected to reach such station; and if, when that time has come, the train has not reached the station, the station master or person in charge of the station shall write, or cause to be written, on the blackboard in like manner, a fresh notice, stating, to the best of his knowledge and belief, the time when such overdue train may then be expected to reach such station;

Duty of station agents, etc., when train is overdue.

2. Every such company, station master or person in charge at any such station is (on summary conviction) (2) liable to a penalty not exceeding five dollars for every wilful neglect, omission or refusal to obey the provisions of this section;

Penalty for non-compliance.

3. Every such company shall have a printed copy of this section posted up in a conspicuous place at each of its stations at which there is a telegraph office.

Copy of this section to be posted up.

R. S. Q., Art. 5174.—(1) omitted, (2) omitted. "Any suit for the recovery of any such penalty may be brought before any two Justices of the Peace, or before the Circuit Court of the district or county in which such station is situated."

"The penalty, recoverable under the provisions of this Article, shall belong to the person suing therefor."

"Every proceeding brought by virtue of this article shall be commenced within one month following the commission of the offence, and not after."

"Nothing in this article shall prejudice the right of any person to the recovery of damages from any such railway by reason of detention of trains as aforesaid."

CARRIAGE OF MAILS, NAVAL AND MILITARY FORCES, ETC.

Carriage of
Her Majesty's
mails, etc.

264. Her Majesty's mails, Her Majesty's naval or military forces or militia, and all artillery, ammunition, provisions or other stores for their use, and all policemen, constables or others travelling on Her Majesty's service, shall at all times, when required by the Postmaster General of Canada, the Commander of the Forces, or any person having the superintendence and command of any police force respectively, and with the whole resources of the company if required, be carried on the railway, on such terms and conditions and under such regulations as the Governor (2) in Council (1) makes. (3)

R. S. O., ch. 170, sec. 44 (1).—(1) "or Lieutenant-Governor in Council," (2) "general," (3) "as the case requires."
R. S. M., ch. 130, sec. 121. Same as Ontario.
N. B., 1891, ch. 18, sec. 35. Same as Ontario.
R. S. N. S., ch. 53, sec. 27 (1). Same as Dominion.

TELEGRAPH LINES.

Government
to have use of
telegraph if
required.

265. The company shall, when required so to do by the (Governor in Council) (1) or any person authorized by (him) (2) place any electric telegraph (and telephone lines) (3) and the apparatus and operators it has, at the exclusive use of the Government (of Canada), (4) receiving thereafter reasonable compensation for such service.

R. S. O., ch. 170, sec. 44 (2).—(1) "Governor General or Lieutenant-Governor, as the case may be," (2) "them," (3) omitted, (4) omitted.
R. S. M., ch. 130, sec. 122. Same as Ontario, excepting (2) "him."
N. B., 1891, ch. 18, sec. 35 (2). Same as Ontario, excepting "telephone," additional.
R. S. N. S., ch. 53, sec. 27 (2). Same as Dominion, excepting (3) omitted.
R. S. Q., Art. 5176 (1). "Railway companies shall have the right to establish telegraph lines along the whole extent of the railway, at such places along the line, and with offices at such places as shall be determined upon by the directors, and such telegraphs may be used by the public generally, in conformity with the rules and regulations that the company may adopt."

Telegraph
lines may be
constructed by
Government.

266. The Governor in Council may, at any time, cause a line or lines of electric telegraph (or telephone) (1) to be constructed along the line of the railway, for the use of the Government (of Canada), (2) and for that purpose may enter upon and occupy so much of the lands of the company as is necessary for the purpose.

R. S. N. S., ch. 53, sec. 27 (3).—(1) omitted, (2) omitted. (They may also construct telegraph lines for public use. See sec. 7 (20).)

R. S. O., ch. 170, sec. 44 (3). "Any further enactments which the Parliament of Canada or the Legislature of this Province may make for the carriage of the mail or Her Majesty's forces, and other persons and articles as aforesaid, or the tolls therefor, or in any way respecting the use of any electric telegraph or other service to be rendered to the Government, shall not be deemed an infringement of the privileges intended to be conferred by this Act or the Special Act."

N. B., 1891, ch. 18, sec. 35 (3). Same as Ontario.

R. S. M., ch. 130, sec. 123. Same as Ontario.

ACCIDENTS, COMMISSIONS TO INVESTIGATE.

267. Every company shall, as soon as possible, and within forty-eight hours, at the furthest, after the occurrence upon the railway belonging to such company, of any accident attended with serious personal injury to any person using the same, or whereby any bridge, culvert, viaduct or tunnel on or of the railway has been broken, or so damaged as to be impassable or unfit for immediate use, will give notice thereof to the (Minister), (1) and every company which wilfully omits to give such notice shall forfeit to Her Majesty the sum of two hundred dollars for every day during which the omission to give the same continues.

Notice of accidents to be given.

Penalty for non-compliance.

R. S. O., ch. 170, sec. 71.—(1) "Commissioner of Public Works."

R. S. Q., Art. 5198.—(1) "Railway Committee."

N. B., 1891, ch. 18, sec. 58.—Same as Ontario, adding "Chief" before "Commissioner."

R. S. N. S., ch. 53, sec. 48.—(1) "Governor in Council."

268. The Governor in Council, on the recommendation of the Minister, may appoint such person or persons as he thinks fit to be a commissioner or commissioners for inquiring into the causes of and the circumstances connected with any accident or casualty to life or property occurring on any railway, and into all particulars relating thereto; and such commissioner or commissioners shall receive such remuneration for his or their services as the Governor in Council determines.

Commissioners to inquire into accidents.

Remuneration

269. The commissioner or commissioners shall report fully, in writing, to the Minister, his or their doings and opinions on the matters respecting which he or they are appointed to inquire.

Report.

270. The remuneration of the commissioners and the fees and allowances to the witnesses shall be paid out of any moneys provided by Parliament for unforeseen expenses.

Payment of commissioners and witnesses.

CATTLE AT LARGE.

Cattle not to
be at large
near railway.

271. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in charge of some person or persons, to prevent their loitering or stopping on such highway at such intersection ;

Such cattle
may be im-
pounded.

2. All cattle found at large contrary to the provisions of this section may, by any person who finds the same at large, be impounded in the pound nearest to the place where the same are so found, and the pound-keeper with whom the same are so impounded shall detain the same in the like manner, and subject to the like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property ;

No right of
action in such
case.

3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

R. S. O., ch. 170, secs. 103, 104, 105.

R. S. Q., Art. 5156, 5157, 5158.

R. S. N. S., ch. 53, secs. 76, 77, 78

CATTLE NOT ALLOWED WITHIN FENCES—EXCEPTIONS.

No cattle to
be taken on
line.

272. Every person who rides, leads or drives any horse or any other animal (or suffers any such horse or other animal to enter upon such railway), (1) and within the fences and guards, other than the farm crossings, without the consent of the company, shall (on summary conviction) (2) be liable to a penalty not exceeding forty dollars, and shall also pay to any person aggrieved all damages sustained thereby.

Penalty.

R. S. O., ch. 170, sec. 30 (5).—(1) omitted, (2) omitted.

R. S. Q., Arts. 5171 (5). Same as Ontario.

R. S. M., ch. 130, sec. 36. Same as Ontario.

N. B., 1891, ch. 18, sec. 22 (5).

R. S. N. S., ch. 53, sec. 16 (4).

R. S. N. S., ch. 53, sec. 16 (5). Contains provisions for enforcing preceding provisions.

NO PERSON TO WALK ON TRACK, ETC.—EXCEPTIONS.

273. Every person, not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars; Penalty.

2. Every person who enters upon any railway train without the knowledge or consent of an officer or servant of the company, with intent fraudulently to be carried upon the said railway without paying fare thereon, is liable, on summary conviction, to a penalty not exceeding ten dollars, or in default of payment to imprisonment for a term not exceeding ten days; Wrongfully entering train.

3. Any person charged with an offence under this section shall be a competent witness on his own behalf. Person charged a competent witness.

R. S. O., ch. 170, sec. 30 (6). "No person other than those connected with or employed by the railway shall walk along the track thereof, except where the same is laid across or along a highway." (a)

R. S. M., ch. 130, sec. 37. Same as Ontario, excepting (a) "and not even then if the track be laid on a separate and distinct part of such highway, and if it be so expressed or understood between the Company and the Municipal Council in whose territory such highway is comprised; nor shall any part of the said section be held to apply if the track be so laid."

R. S. Q., Art. 5171 (6). Same as Ontario.
N. B., 1891, ch. 18, sec. 22 (6). Same as Ontario.
R. S. N. S., ch. 53, sec. 16 (6). Same as Ontario.

274. If the (Railway Committee) (1) orders any company to erect at or near or in lieu of any level crossing of a road, or other public highway, a foot bridge or foot bridges over its railway, for the purpose of enabling persons passing on foot along such turnpike road or public highway to cross the railway by means of such bridge or bridges,—from and after the completion of such foot bridge or foot bridges so required to be erected, and while the company keep the same in good and sufficient repair, such level crossing shall not be used by foot passengers on the said turnpike road or public highway, except during the time when the same is used for the passage of carriages, carts, horses or cattle along the said road; Foot passengers to use foot bridge if provided.

2. Every person who offends against the provisions of this section is liable, on summary conviction, to a penalty not exceeding ten dollars. Penalty for contravention.

R. S. Q., Art. 5155. Same as Dominion, 1st part ; 2nd part omitted.
 R. S. N. S., ch. 53, sec. 75. Same as Quebec, excepting (1) "Governor in Council."

R. S. O., ch. 170, sec. 102. Same as Quebec, excepting (1) "Commissioner of Public Works."

N. B., 1891, ch. 18, sec. 82. Same as Quebec, excepting (1) "Chief Commissioner of Public Works."

WEEDS ON COMPANY'S LAND TO BE CUT DOWN.

Weeds to be cut down.

275. Every company shall cause all thistles and other noxious weeds growing on the clear land or ground adjoining the railway and belonging to such company to be cut down (early in July in each year) (1) or to be rooted out ;

Penalty for non-compliance.

2. Every company which fails to comply with this section shall incur a penalty of two dollars for every day during which such company neglects to do anything which it is so required to do ; and the mayor, reeve or chief officer of the municipality of the township, county or district in which the land or ground lies, or any justice of the peace therein, may cause all things to be done which the said company is so required to do, and for that purpose may enter, by himself and his assistants or workmen, upon such lands or grounds, and may recover the expenses and charges incurred in so doing, and the said penalty, with costs, in any court of competent jurisdiction, and such penalty shall be paid to the proper officer of the municipality.

Mayor, etc., may cause work to be done.

Application of penalty.

N. B., 1891, ch. 18, sec. 84 "Every railway company, whether any of the clauses or provisions of this Act are or are not incorporated with the Act incorporating the company, shall cause all cleared land or ground adjoining their railway, and belonging to the Company, to be (1) cleared of all thistles, and other noxious weeds growing on the lands or grounds to be cut down and kept constantly cut down, or to be rooted out of the same."

R. S. O., ch. 170, sec. 107. Same as New Brunswick, excepting (1) "sown or laid down with grass or turf, and cause the same, as far as may be in their power, to be covered with grass or turf, if not already so covered."

R. S. Q., Art. 5160. Same as Dominion, 1st part, excepting (1) "and kept constantly cut down."

R. S. N. S., ch. 53, sec. 80. Same as Quebec.

N. B., 1891, ch. 18, sec. 84. If a railway company fails to comply with the requirements of the last preceding section within twenty days after they have been required to comply with the same, by notice from the mayor (warden) (2) or chief officer of the municipality (3) in which the ground or land lies, (a) the Company shall incur a penalty of (ten dollars) (4) to the use of the municipality, for each day during which they neglect to do anything which they are lawfully required to do by the notice ; and the said mayor (warden) (5) or chief officer, (6) may cause all things to be done which the company were lawfully required to do by the notice, and for that purpose may enter by himself and his assistants or workmen upon the lands or

grounds, and such municipality may recover the expenses and charges incurred in so doing, and the said penalty, with costs of suit in any Court having jurisdiction in civil cases, to the amount sought to be recovered.

R. S. O., ch. 170, sec. 108. Same as N. B., sec. 84, excepting (2) "Reeve," (3) "of the township or county," (4) "two dollars," (5) "Reeve."

R. S. Q., Art. 5161. Same as New Brunswick sec. 84, excepting (2) omitted, (1) "of the township, county or parish," (a) "or from a justice of the peace therein," (4) "two dollars," (6) "or justice of the peace."

R. S. N. S., ch. 53, sec. 81. Same as Quebec, excepting "district" for "parish."

COMPANY MAY NOT PURCHASE RAILWAY SECURITIES.

276. No company shall, either directly or indirectly, employ any of its funds in the purchase of its own stock, or in the acquisition of any shares, bonds or other securities issued by any other railway company in Canada; but this shall not affect the powers or rights which any company in Canada now has or possesses by virtue of any special Act to acquire, have or hold the shares, bonds or other securities of any railway company in the United States of America or Canada; nor shall it interfere with the right conferred on the Northern Railway Company of Canada, or the Hamilton & North Western Railway Company, to acquire stock in the Northern & Pacific Junction Railway Company, under the Acts relating to the said first named companies, respectively, passed by the Parliament of Canada in the forty-seventh year of Her Majesty's reign.

R. S. O., ch. 170, sec. 37 (7). "The funds of the company shall not be employed in the purchase of any stock in their own or in any other company."

R. S. Q., Art. 5137 (6). Same as Ontario.

R. S. M., ch. 130, sec. 95. Same as Ontario.

N. B., 1891, ch. 18, sec. 29 (7). Same as Ontario.

R. S. N. S., ch. 53, sec. 22 (6). Same as Ontario.

277. Every director of a railway company, who knowingly permits the funds of any such company to be applied in violation of the next preceding section, shall incur a penalty of one thousand dollars for each such violation,—which penalty shall be recoverable on information filed in the name of the Attorney General of Canada; and a moiety thereof shall belong to Her Majesty, and the other moiety thereof shall belong to the informer; and the acquisition of each share, bond or other security, or interest, as aforesaid, shall be deemed a separate violation of the provisions aforesaid.

SALE OF RAILWAY TO PURCHASER NOT HAVING CORPORATE POWERS.

Sale of railway to a purchaser not having necessary corporate powers.

Notice to the Minister.

And copy of deed of conveyance.

Until such transmission trains not to be run.

Provisional operation of the railway.

License from Minister.

278. If, at any time, any railway or any section of any railway is sold under the provisions of any deed of mortgage thereof, or at the instance of the holders of any mortgage bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and is purchased by any person or corporation which has not any corporate powers authorizing the holding and operating thereof by such purchaser,—the purchaser thereof shall transmit to the Minister, within ten days from the date of such purchase, a notice in writing, stating the fact that such purchase has been made, describing the termini and line of route of the railway purchased, and specifying the charter or Act of incorporation under which the same had been constructed and operated, including a copy of any writing, preliminary to a conveyance of such railway, which has been made as evidence of such sale; and immediately upon the execution of any deed or conveyance of such railway, the purchaser shall also transmit to the Minister a duplicate or an authenticated copy of such deed, and shall furnish to the Minister, on request, any further details or information which he requires.

279. Until the purchaser has given notice to the Minister in manner and form as provided by the next preceding section, the purchaser shall not run or operate the railway so purchased, or take, exact or receive any tolls whatsoever in respect of any traffic carried thereon; but after the said conditions have been complied with, the purchaser may continue, until the end of the then next session of the Parliament of Canada, to operate such railway and to take and receive such tolls thereon as the company previously owning and operating the same was authorized to take, and shall be subject, in so far as they can be made applicable, to the terms and conditions of the charter or Act of incorporation of the said company, until he has received a letter of license from the Minister—which letter the Minister is hereby authorized to grant—defining the terms and conditions on which such railway shall be run by such purchaser during the said period.

280. Such purchaser shall apply to the Parliament of Canada ^{Application for necessary powers.} at the next following session thereof after the purchase of such railway, for an Act of incorporation or other legislative authority, to hold, operate and run such railway; and if such application is made to Parliament and is unsuccessful, the Minister may extend the license to such railway until the end of the then next following session of Parliament, and no longer; and if during such extended period the purchaser does not obtain such Act of incorporation or other legislative authority, such railway shall be closed or otherwise dealt with by the Minister, as is determined by the Railway Committee. ^{Extension of licence.} ^{Final action.}

RAILWAY CONSTABLES.

281. (Any two justices of the peace, or a stipendiary or police magistrate, in the Provinces of Ontario, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, or Manitoba, or the District of Keewatin, and any judge of the Court of Queen's Bench or Superior Court, or clerk of the peace, or clerk of the Crown, or judge of the sessions of the peace, in the Province of Quebec, and any judge of the Supreme Court, or two justices of the peace, in the North-West Territories, and any Commissioner of Parish Court in the Province of New Brunswick) (1) on the application of the directors of any company whose railway passes within the local jurisdiction of such justices of the peace (magistrate, commissioner, judge, clerk, or judge of the sessions of the peace, as the case may be), (2) or on the application of any clerk or agent of such company thereto authorized by such directors, may, in their or his discretion, appoint any persons recommended for that purpose by such directors, clerk or agent, to act as constables on and along such railway; and every person so appointed shall take an oath or make a solemn declaration in the form or to the effect following, that is to say:—

"I, A. B., having been appointed a constable to act upon ^{Form of oath.} and along (*here name the railway*), under the provisions of '*The Railway Act*,' (3) do swear that I will well and truly serve Our Sovereign Lady the Queen in the said office of constable, without favor or affection, malice or ill-will, and

"that I will, to the best of my power, cause the peace to be kept, and prevent all offences against the peace; and that, while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge the duties thereof, faithfully, according to law. So help me God."

R. S. O., ch. 170, sec. 81 (1).—(1) "The Justices of the Peace for any county assembled at any general sessions of the Peace," (2) omitted, (3) "of Ontario."

R. S. Q., Art. 5208.—(1) "any Judge of the Court of Q. B. or of the S. C. or clerk of the Court, or clerk of the peace, or clerk of the Crown, or judge of sessions of the peace," (2) "judge, clerk, or judge of the sessions of the peace," (3) "here insert the title of this section."

By whom to be administered.

Powers of such constable.

General powers.

282. (Such oath or declaration shall be administered in either of the Provinces of Ontario, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island or Manitoba, or in the District of Keewatin, by any one justice of the peace, and in the Province of Quebec by any such judge, clerk, or judge of the sessions of the peace, and in the North-West Territories by any such judge or by any one justice of the peace) (1) and every constable so appointed, who has taken such oath or made such declaration, may act as a constable for the preservation of the peace, and for the security of persons and property against felonies and other unlawful acts on such railway, and on any of the works belonging thereto,—and on and about any trains, roads, wharves, quays, landing places, warehouses, lands and premises belonging to such company, whether the same are in the county, city (town, parish), (2) district or other local jurisdiction within which he was appointed, or in any other place through which such railway passes or in which the same terminates, or through or to which any railway passes which is worked or leased by such company,—and in all places not more than a quarter of a mile distant from such railway,—and shall have all such powers, protections and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery and prosecution of felonies and other offences, and for keeping the peace, which any constable duly appointed has within his constableness.

R. S. O., ch. 170, sec. 81 (2).—(1) "such oath or declaration shall be administered by any one such Justice."

R. S. Q., Art. 5208 (2).—(1) "such oath or declaration shall be administered by any such judge, clerk, or judge of the sessions of the peace."

R. S. O., ch. 170, sec. 82.—(2) omitted.

R. S. Q., Art. 5208 (2). Same as Dominion.

R. S. N. S., ch. 53, sec. 95 (2).—(1) "And such oath or declaration shall be administered by any such warden or justice of the peace.

283. Any such constable may take such persons as are ^{Arrest of} punishable by summary conviction for any offence against the provisions of this Act, or of any of the Acts or by-laws affecting the railway, before any justice or justices appointed for any county, city, town, parish, district or other local jurisdiction within which such railway passes; and every such justice may deal with all such cases, as though the offence had been committed and the persons taken within the limits of his own local jurisdiction.

R. S. O., ch. 170, sec. 83.

R. S. Q., Art. 5208.

R. S. N. S., ch. 53, sec. 59 (2).

284. Any two justices of the peace (or a stipendiary of police ^{Dismissal of} magistrate, in either of the Provinces of Ontario, Nova Scotia, constable. New Brunswick, British Columbia, Prince Edward Island, or Manitoba, or in the District of Keewatin, and any judge of the Court of Queen's Bench or Superior Court, or clerk of the peace, or clerk of the Crown, or judge of the sessions of the peace, in the Province of Quebec, and any judge of the Supreme Court, or two justices of the peace in the North-West Territories) (1) may dismiss any such constable who is acting within their several jurisdictions; and the directors of such company, or any clerk or agent of such company thereto authorized by such directors, may dismiss any such constable who is acting on such railway; and upon every such dismissal, all powers, ^{Effect of dis-} protections and privileges which belonged to any such per- ^{missal.} son by reason of such appointment shall wholly cease; and no person so dismissed shall be again appointed or act as constable for such railway, without the consent of the authority by whom he was dismissed.

R. S. O., ch. 170, sec. 84.—(1) omitted.

R. S. Q., Art. 5208 (3).—(1) "Any judge of the Court of Queen's Bench, or of the superior court, or clerk of the peace, or clerk of the Crown, or judge of the sessions of the peace"—"any two Justices of the Peace" omitted.

R. S. N. S., ch. 53, sec. 59 (3). Substitute "any warden of the municipality or any justice of the peace," for first sight lines of sec. 284 Dom. Act, remainder the same as Dominion.

Record of appointment to be kept.

285. Every such company shall cause to be recorded in the office of the clerk of the (peace), (a) for every county (city, town, parish, district) (1) or other local jurisdiction wherein such railway passes, the name and designation of every constable so appointed at its instance, the date of his appointment, and the authority making it, and also the fact of every dismissal of any such constable, the date thereof, and the authority making the same, within one week after the date of such appointment or dismissal, as the case may be; and such clerk of the peace shall keep such record in such form as the (Minister) (2) from time to time directs, in a book which shall be open to public inspection, charging such fee as the (Minister) (3) from time to time, authorizes.

R. S. O., ch. 170, sec. 85.—(1) Omitted, (2) "Lieutenant-Governor in Council," (3) "Lieutenant-Governor in Council."

R. S. Q., Art. 5208 (4).—(2) (3) "Railway Committee."

R. S. N. S., ch. 53, sec. 59 (4).—(2) (3) "Governor in Council." (a) "Municipality."

Punishment of constable guilty of neglect of duty.

286. Every such constable who is guilty of any neglect or breach of duty in his office of constable shall be liable, on summary conviction thereof, within any county, city, district or other local jurisdiction wherein such railway passes, to a penalty not exceeding eighty dollars, or to imprisonment, with or without hard labor, for a term not exceeding two months. (1) Such penalty may be deducted from any salary due to such offender, if such constable is in receipt of a salary from the company.

R. S. O., ch. 170, sec. 86.

R. S. Q., Art. 5208 (5).—(1) "in the gaol of such county, city, district or other local jurisdiction."

R. S. N. S., ch. 53, sec. 59 (5).

LIMITATION OF ACTIONS FOR DAMAGES—GENERAL ISSUE.

Limitation of actions for damages.

287. All actions or suits for indemnity for any damages or injury sustained by reason of the railway shall be commenced within (one year) (1) next after the time when such supposed damage is sustained, or if there is continuation of damage, within (one year) (2) next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead (the general issue) (3) and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done, in pursuance of and by the authority of this Act or of the special Act.

What may be pleaded.

DOMINION AND PROVINCIAL RAILWAY ACTS. cxxix

R. S. O., ch. 170, sec. 42 (1).—(1) "six months," (2) "six months,"
(3) "not guilty by statute."

R. S. Q., Art. 5175 (1). Same as Dominion, omitting "or if there is continuation of damage within one year next after the doing or committing of such damage ceases, and not afterwards."

R. S. M., ch. 130, sec. 116.—(1) "six months," (2) "six months,"
N. B., 1891, ch. 18, sec. 33. Same as Dominion, excepting (3) "not guilty by statute."

R. S. N. S., ch. 53, sec. 26 (1)—(1) "six months," (2) "six months,"
(3) omitting "the general issue, and give."

COMPANY NOT RELIEVED FROM LEGAL LIABILITY BY INSPECTION OR ANYTHING DONE HEREUNDER.

288. No inspection had under this Act, and nothing in this Inspection, Act contained, and nothing done or ordered or omitted to be etc., not to relieve com- done or ordered, under or by virtue of the provisions of this Act, pany from liability. shall relieve, or be construed to relieve, any company of or from any liability or responsibility resting upon it by law, either towards Her Majesty (or towards any person) (b) or the wife or husband, parent or child, executor or administrator, tutor or curator, heir or personal representative of any person, for anything done or omitted to be done by such company, or for any wrongful act, neglect or default (misfeasance, malfeasance or nonfeasance) (a) of such company, or in any manner or way to lessen such liability or responsibility, or in any way to weaken or diminish the liability or responsibility of any such company, under the (laws in force in the Province in which such liability or responsibility arises). (1)

R. S. O., ch. 170, sec. 68.—(1) "existing laws of the Province."

R. S. Q., Art. 5199.—(a) omitted, (1) "laws in force in this Province."

N. B., 1891, ch. 18, sec. 55.—(b) omitted, (1) "laws existing in this Province."

R. S. N. S., ch. 53, sec. 51. Same as Dominion.

OFFENCES AND PENALTIES.

289. Every company, director or officer doing, causing or per- Liability of mitting to be done, any matter, act or thing contrary to the pro- company, etc., visions of this or the special Act, or to the orders or directions of in cases specified. the Governor in Council, or of the Railway Committee or Minister made hereunder, or omitting to do any matter, act or thing required to be done on the part of any such company, director or officer, is liable to any person injured thereby for the full amount of damages sustained by such act or omission; and if no other Penalty.

penalty is in this or the special Act provided for any such act or omission, is liable, for each offence, to a penalty of not less than twenty dollars, and not more than five thousand dollars, in the discretion of the court before which the same is recoverable ;

Application
of this section.

2. This section shall only apply to companies and directors and officers of companies within the legislative authority of the Parliament of Canada.

Damages for
extortionate
toll.

290. Every person from whom any company exacts any unjust or extortionate toll, rate or charge shall, in addition to the amount so unjustly exacted, be entitled to recover from the company as damages an amount equal to three times the amount so unjustly exacted.

Penalty for
placing baggage
cars in
rear of passenger
cars.

291. Every officer or servant of any company, or any person employed by it, who directs or knowingly permits any baggage, freight, merchandise or lumber car to be placed in the rear of the passenger cars, is guilty of a misdemeanor.

R. S. M., ch. 131, sec. 36.

Intoxication a
misdemeanor.

292. Every person who is intoxicated while he is in charge of a locomotive engine, or acting as the conductor of a car or train of cars (is guilty of a misdemeanor). (1)

R. S. Q., Art. 5173 (11).—(1) "shall be liable to a fine of not less than twenty-five or more than one hundred dollars."

Penalty for
selling liquor
to employees.

293. Every person who sells, gives or barter any spirituous or intoxicating liquor to or with any servant or employee of any company, while on duty, is liable on summary conviction to a penalty not exceeding fifty dollars, or to imprisonment with or without hard labor for a period not exceeding one month, or to both.

Punishment
for violation
of certain by-
laws.

294. Every officer or servant of, and every person employed by the company, who wilfully or negligently violates any by-law, rule or regulation of the company lawfully made and enforced, or any order or notice of the Railway Committee (or of the Minister), (a) or of an inspecting engineer, of which a copy has been delivered to him, or which has been posted up or open to his inspection in some place where his work or his duties, or any of them, are to be performed, if such violation causes injury to any

person or to any property, or exposes any person or any property to the risk of injury, or renders such risk greater than it would have been without such violation, although no actual injury occurs (is guilty of a misdemeanor, and shall, in the discretion of the court before which the conviction is had, and according as such court considers the offence proved to be more or less grave, or the injury or risk of injury to person or property to be more or less great, be punished by fine or imprisonment, or both; but no such fine shall exceed four hundred dollars, and no such imprisonment shall exceed the term of five years). (1) If injury is caused or risk of injury is increased.

R. S. Q., Art. 5216.—(1) "the person convicted of such contravention shall, in the discretion of the court before whom the conviction is had, be punished by fine or imprisonment, so that no such fine exceeds \$400 nor any such imprisonment the term of five years." (a) omitting.

295. The company may, in all cases under (the next preceding section), (1) pay the amount of the penalty and costs, and recover the same from the offender or deduct it from his salary or pay. Deduction of penalty from wages, or recovery.

R. S. Q., ch. 170, sec. 110.—(1) "this Act, or under the Railway Act of Canada."

R. S. Q., Art. 5219.—(1) "the three next preceding articles."

296. Every person who wilfully or negligently violates any law, rule or regulation of the company is liable, on summary conviction, for each offence, to a penalty not exceeding the amount therein prescribed, or if no amount is so prescribed, to a penalty not exceeding twenty dollars; but no such person shall be convicted of any such offence, unless at the time of the commission thereof a printed copy of such by-law, rule or regulation was openly affixed to a conspicuous part of the station at which the offender entered the train or at or near which the offence was committed. Penalty for violation of by-laws, etc., generally.

297. Every person who,—

(a) Bores, pierces, cuts, opens or otherwise injures any box or package, which contains wine, spirits or other liquors, or any case, box, sack, wrapper, package or roll of goods, in, on or about any car, wagon, boat, vessel, warehouse, station house, wharf, quay, or premises of, or which belong to any company, with intent feloniously to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or,— Punishment of persons cutting or boring casks or packages.

Drinking or
wasting
liquor.
Penalty.

(b) Unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof,—

Is liable, on summary conviction, (1) to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so taken or destroyed, or to imprisonment with or without hard labor for a term not exceeding one month (or to both). (2)

R. S. Q., Art. 5214.—(1) “before one or more justices of the peace,” (2) omitted.

STATISTICS.

Interpreta-
tion; “com-
pany.”

298. In (the following sections of this Act down to section three hundred and five inclusive, unless the context otherwise requires), (1) the expression “company” means a company (2) constructing or operating a line of railway in (Canada, whether otherwise within the legislative authority of the Parliament of Canada or not), (3) and includes any individual or individuals not incorporated, who are owners or lessees of a railway in (Canada) (4) or parties to an agreement for working a railway in (Canada). (5)

R. S. Q., Art. 5177.—(1) “this subsection,” (2) “incorporated either before or after the coming into force of these Revised Statutes for the purpose of,” (3) “this province,” (4) “the said province,” (5) “the same.”

Annual re-
turns to be
prepared.

299. Every company shall annually prepare returns in accordance with the forms contained in schedule one to this Act, of its capital, traffic and working expenditure, and of all information required, as indicated in the said form, to be furnished to the Minister; and such returns shall be dated and signed by, and attested upon the oath of the secretary, or some other chief officer of the company, and of the president, or, in his absence, of the vice-president or manager of the company;

How attested.

What period
to be includ-
ed.

2. Such returns shall be made for the period included from the date to which the then last yearly returns made by the company extended, or from the commencement of the operation of the railway, if no such returns have been previously made, and, in either case, down to the last day of June in the then current year;

Duplicate for
the Minister.

3. A duplicate copy of such returns, dated, signed and attested in manner aforesaid, shall be forwarded by such company to the Minister within three months after the first day of July in each year;

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4. The company shall also, in addition to the information required to be furnished to the Minister, as indicated in the said schedule one, furnish such other information and returns as are, from time to time, required by the Minister; Further returns when required.

5. Every company which makes default in forwarding such returns in accordance with the provisions of this section shall incur a penalty not exceeding ten dollars for every day during which such default continues; Penalty for non-compliance.

6. The Minister shall lay before both Houses of Parliament, within twenty-one days from the commencement of each session thereof, the returns made and forwarded to him in pursuance of this section. Returns to be submitted to Parliament.

R. S. O., ch. 170, sec. 44 (6). "After the opening of the railway, or any part thereof, to the public, and within the first fifteen days after the opening of each session of the Legislature, an account shall be annually transmitted to the (Provincial Secretary) (a) containing a detailed and particular account, attested upon oath of the president, or, in his absence, of the vice-president, of the moneys received and expended by the company, and a classified statement of the passengers and goods transported by them, with an attested copy of the last annual statement."

R. S. Q., Art. 5176 (4). Same as Ontario, excepting (a) "three branches thereof."

R. S. Q., Art. 5178. "Every company shall annually prepare returns of their capital, in accordance with the form of Schedule A of this section, and a copy of such returns, signed by the president or other head officer of the company resident in the Province, and by the officer of the company responsible for the correctness of such returns, or any part thereof, shall be forwarded by the company to the Commissioner of Public Works, not later than (three) (b) months after the end of the calendar year; together with a copy of the then last annual return of the traffic and working expenditure, which every such company is required to keep, in accordance with the provisions of their respective charters of incorporation, to be verified in manner and form aforesaid, and furnished (c) in such form as the said Commissioner shall approve of or prescribe."

"Any company which fails to forward the said returns in accordance with the provisions of this Article shall be liable to a penalty not exceeding (ten dollars) (d) for every day during which such default continues."

R. S. M., ch. 130, sec. 125. Same as Ontario, sec. 44 (6), excepting (a) "Railway Commissioner for Manitoba."

N. B., 1891, ch. 18, sec. 35 (6). Same as Ontario, sec. 44 (6).

R. S. N. S., ch. 53, sec. 29. Same as Quebec, Art. 5178, excepting (b) "two," (c) "according to form shown in schedule 2 of this chapter or," (d) "fifty."

300. Every company shall, weekly, prepare returns of its Weekly traffic for the next preceding seven days, in accordance with the form contained in schedule (two) (1) to this Act, and a copy of such returns, signed by the officer of the company responsible; Weekly returns to be prepared and transmitted.

Copy to be posted up. for the correctness of such returns, shall be forwarded by the company to the (Minister) (2) within seven days (from the day in each week up to which the said returns have been prepared), (3) and another copy, of each of such returns, signed by the same officer, shall be posted up by the company within the same delay, and kept posted up for seven days, in some conspicuous place in the most public room in the head office of the company in (Canada), (4) and so that the same can be perused by all persons; and free access thereto shall be allowed to all persons during the usual hours of business at such office, on each day of the said seven days not being a Sunday or holiday;

Penalty for non-compliance.

2. Every company which makes default in forwarding the said weekly returns to the (Minister), (5) or which fails to post up and keep posted up a copy thereof as aforesaid, and to allow free access thereto as aforesaid, shall incur a penalty not exceeding ten dollars for every day during which such default continues.

R. S. Q., Art. 5179.—(1) "B," (2) "Commissioner," (3) omitted, (4) "the Province," (5) "Commissioner."

Penalty for signing false return.

301. Every person who, knowing the same to be false in any particular, signs any return required by the two sections next preceding (is guilty of a misdemeanor). (1)

R. S. N. S., ch. 53, sec. 31 (1).—(1) "shall be liable, on conviction thereof, to a penalty not to exceed two hundred and fifty dollars."

Return of accidents to be made.

302. Every company shall, within (one month) (1) after the first days of January and July, in each and every year, make to the (Railway Committee), (2) under the oath of the president, secretary or superintendent of the company, a true and particular return of all accidents and casualties, whether to life or property, which have occurred on the railway of the company during the half year next preceding each of the said periods respectively, setting forth,—

Cause and nature.
Locality and time.

(a) The causes and natures of such accidents and casualties;
(b) The points at which they occurred, and whether by night or by day;

Extent and particulars.
Copies of by-laws.

(c) The full extent thereof, and all the particulars of the same;
And shall, also, at the same time, return a true copy of the existing by-laws of the company, and of its rules and regulations for the management of the company and of its railway.

R. S. O., ch. 170, sec. 72.—(1) "ten days," (2) "Commissioner of Public Works."

R. S. Q., Art. 5202. Same as Dominion.

N. B., 1891, ch. 18, sec. 59.—(1) "ten days," (2) "Chief Commissioner of Public Works."

R. S. N. S., ch. 53, sec. 54.—(2) "Governor in Council."

303. The (Minister) (1) may order and direct, from time to time, the form in which such returns shall be made up, and may order and direct any company to make up and deliver to (the Minister), (2) from time to time, in addition to the said periodical returns, returns of serious accidents occurring in the course of the public traffic upon the railway belonging to such company, whether attended with personal injury or not, in such form and manner as the (Minister) (3) deems necessary and requires for his information with a view to the public safety.

R. S. O., ch. 170, sec. 73.—(1) "Commissioner of Public Works," (2) "him," (3) "Commissioner."

R. S. Q., Art. 5203.—(1) "Railway Committee," (2) "them," (3) "Committee."

N. B., 1891, ch. 18, sec. 60.—(1) "Chief Commissioner of Public Works," (2) "him," (3) "Chief Commissioner."

R. S. N. S., ch. 53, sec. 55.—(1) "Governor in Council," (2) "them," (3) "Governor in Council."

304. If the returns required under the two sections next preceding, so verified, are not delivered within the respective times in the said sections prescribed, or within fourteen days after the same have been so required by the (Minister), (1) every company which makes default in so doing shall forfeit to Her Majesty the sum of one hundred dollars for every day during which the company neglects to deliver the same.

R. S. O., ch. 170, sec. 74.—(1) "Commissioner."

R. S. Q., Arts. 5204.—(1) "Committee."

N. B., 1891, ch. 18, sec. 61.—(1) "Chief Commissioner."

R. S. N. S., ch. 53, sec. 56.—(1) "Governor-in-Council."

305. All (1) returns (made in pursuance of any of the provisions of the seven sections of this Act next preceding) (2) shall be privileged communications and shall not be evidence in any court whatsoever.

R. S. O., ch. 170, sec. 75. (1) "such," (2) omitted.

R. S. Q., Art. 5205 and 5181. Same as Ontario.

N. B., 1891, ch. 18, sec. 62. Same as Ontario.

R. S. N. S., ch. 53, sec. 57. Same as Ontario.

CERTAIN RAILWAYS DECLARED WORKS FOR GENERAL ADVANTAGE
OF CANADA.

Certain rail-
ways declar-
ed to be
works for
advantage of
Canada.

306. The Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton & North-Western Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario & Quebec Railway, and the Canadian Pacific Railway, are hereby declared to be works for the general advantage of Canada, and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada.

To be subject
to legislative
authority of
Parliament.

307. Every such railway and branch line shall hereafter be subject to the legislative authority of the Parliament of Canada; but the provisions of any Act of the Legislature of any Province of Canada, passed prior to the twenty-fifth day of May, one thousand eight hundred and eighty-three, relating to any such railway or branch line, and in force at that date, shall remain in force so far as they are consistent with any Act of the Parliament of Canada passed after that date.

Statutes of Can., 1893, 56 Vic., ch. 27, sec. 3. The electric railway, for the construction and operation of which power was given to the Niagara Falls Park & River Railway Company by the Act of the Legislature of Ontario, fifty-fifth Victoria, chapter ninety-six, is hereby declared not to be affected by sections three hundred and six and three hundred and seven of *The Railway Act*, so long as the said railway is operated by electricity; and it is hereby further declared and enacted that the said electric railway shall not be deemed to be affected by any Act respecting railways hereafter passed, unless such Act is in express terms declared to extend thereto.

Certain Acts
of Provincial
Legislatures
may be con-
firmed.

308. The Governor-General may, at any time and from time to time, by proclamation or proclamations, confirm any one or more of the Acts of the Legislature of any Province of Canada, passed before the passing of this Act, relating to any railway which, by any Act of the Parliament of Canada, has been declared to be a work for the general advantage of Canada, and from and after the date of any such proclamation the Act or Acts thereby declared to be confirmed shall be confirmed, ratified and made as valid and effectual as if the same had been duly enacted by the Parliament of Canada. All acts, matters and things which have been or may hereafter be done under any Act which may

Effect of such
confirmation.

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be so confirmed by proclamation, and which might lawfully have been done if such Act or Acts which shall be so confirmed by proclamation had been within the competence of the respective legislatures by which the same were adopted, shall be ratified and confirmed, and made as good and valid as if such Act or Acts had, at the several dates at which the same purport respectively to have come into force, been enacted by the Parliament of Canada.

REPEAL.

309. This Act shall be substituted for the Revised Statutes, Repeal, R.S. chapter one hundred and nine, which with the Act fifty and fifty-^{C., c. 109 :} one Victoria, chapter nineteen, intituled "*An Act to amend the c. 19.* ^{50 51 V.,} *Railway Act*," is hereby repealed.

SCHEDULE ONE.

Form of yearly returns to the Minister of Railways and Canals, required from railway companies under "*The Railway Act*." RETURNS made by the (*corporate name of the Company*) in pursuance of "*The Railway Act*," for the period included between the (*insert the day to which the last returns extend, or the date of the commencement of operations, as the case may be*), to the last day of June, in the year 18

LOCATION AND GENERAL DESCRIPTION OF RAILWAY.

Showing the county or counties through which the railway runs, the terminal points, connections, if any, and giving a general description of the line and the country through which it passes.

Statement containing copies of all contracts made by the Company, for the construction of any part of the railway.

RETURNS of the Capital Account of the said Railway, and the
Revenue and Expenditure, etc.

NO. I.—CAPITAL ACCOUNT.

	Author- ized.	Sub- scribed.	Paid up.	*Rate of Interest or Dividend.
	\$ cts.	\$ cts.	\$ cts.	\$ cts.
Total amount of ordinary share capital..				
do of preference share capital.				
do do ..				
do do ..				
do do ..				
do of ordinary bonds				
do do				
do do				
do do				
do do				
do of Government loans				
do do bonuses ..				
do do subscription to shares.				
do do subscription to bonds.				
do of municipal loans				
do do bonuses				
do do subscription to shares				
do do subscription to bonds				
do from other sources. ...				
Total capital				

*State whether dividend is cumulative or not.

This statement must agree with the totals shown in the report of the company, a copy of which is to be transmitted also. If there are more issues of preference shares or bonds than one, state them, and the amount of each class.

If any floating debt exists it must be stated, so as to make the total agree with the published report.

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No. 2.—LOANS OR BONUSES FROM GOVERNMENTS OR MUNICIPALITIES.

From what source.	Amount of Loan Granted.	Amount of Bonus Granted.	Amount of Subscription to Shares.	Amount of Subscription to Bonds.	Rate of Interest.	Date of Repayment.
	\$ cts.	\$ cts.	\$ cts.	\$ cts.	\$ cts.	\$ cts.
Governments....						
Total.....						
Municipalities....						
Total.....						

No. 3.—BONDS OR OTHER SECURITIES NEGOTIATED BY THE COMPANY.

Amounts.	Rate of Interest.	Date of Sale.	Prices Realized.
\$ cts.	\$ cts.	\$ cts.	\$ cts.

No. 4.—SALES OF LAND MADE BY THE COMPANY.

Acres Sold.	Price per Acre.	Amount.
	\$ cts.	\$ cts.

No. 5.—FLOATING DEBT.

Amount.	Rate of Interest.	Remarks.
\$ cts.	\$ cts.	

No. 6.—CHARACTERISTICS OF ROAD, ETC.

OWNED.		Miles.
*Length of main line from	to	
do branch from	to	
do do	to	
do do	to	
do do	to	
LEASED.		
Length of railway from	to	
do do	to	
do do	to	
do do	to	
Total mileage worked		
Length of road laid with iron rails.....		
do do steel rails		
do of sidings.....		
do of double track (if any).....		
Weight of rail per yard, main line, iron.....		Lbs.
do do steel		do
do do branches, iron.....		do
do do steel		do
Number of engine houses and shops		
do of engines owned by Company.....		
do do hired.....		
do of first-class passenger cars owned by Company.....		
do do hired.....		
do of second-class and emigrant cars owned by Company.....		
do do hired.....		
do of baggage, mail and express cars owned by Company.....		
do do hired		
Number of cattle and box freight cars owned by Company.....		
do do hired.....		
do of platform cars owned by Company.....		
do do hired		
do of coal cars owned by Company		
do do hired		
do of ties to mile, main line.....		
do do branches.....		
Nature of fastenings used to secure joint of rail.....		
Number of grain elevators.....		
Capacity of do at		
do do		
do do		
Number of level road crossings at which watchmen are employed.....		
do do without watchmen.....		
do of overhead bridges.....		
Height of do above rail level.....		
Number of level crossings of other railways.....		
do of junctions with other railways.....		
do do branch lines		
Radius of sharpest curve.....		
Number of feet per mile of heaviest gradient		
Gauge of railway.....		

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NO. 7.—ACTUAL COST OF RAILWAY AND ROLLING STOCK.

	\$	cts.
1. Cost of land and land damages.....		
2. Cost in connection with the administration of the Land Grant in aid, if any.....		
3. Cost of grading, masonry and bridging, station buildings, etc..		
4. Cost of rolling stock of all kinds, including workshops.....		
Total.....		

The above total to show the real cash cost of construction and rolling stock

* If the line, or any portion of it, is under construction, the length being constructed to be given.

† State where these are situated, and the capacity of each.

NO. 8.—OPERATIONS OF THE YEAR AND NUMBER OF MILES RUN.

1. Miles run by passenger trains.....	
2. do freight trains.....	
3. do mixed trains.....	
4. Total miles run by trains.....	
5. do engines.....	
6. Total number of passengers carried.....	
7. do tons of freight (of 2,000 lbs. carried)....	
8. Average rate of speed of passenger trains.....	
9. do freight trains.....	
10. Average weight of passenger trains in motion.....	
11. do freight trains in motion..	

NO. 9.—DESCRIPTION OF FREIGHT CARRIED.

	Weight in Tons.
1. Flour in barrels, No.....	
2. Grain in bushels, No.....	
3. Live stock, No.....	
4. Lumber of all kinds, excepting firewood, ft.....	
5. Firewood, number of cords of 128 cubic ft.....	
6. Manufactured goods.....	
7. All other articles.....	
Total weight carried.....	

NO. 10.—EARNINGS OF THE RAILWAY.

	\$	cts.
1. From passenger traffic.....		
2. From freight traffic.....		
3. From mails and express freight.....		
4. From other sources.....		
Total.....		

NO. 11.—GENERAL TARIFF OF TOLLS ESTABLISHED BY
THE COMPANY.

NO. 12.—SPECIAL RATES OF TOLLS ESTABLISHED BY THE
COMPANY.

NO. 13, A.—OPERATING EXPENSES—MAINTENANCE OF LINE,
BUILDINGS, ETC.

	cts.
1. Wages, etc., of labor employed on track, including sidings	
2. Cost of iron rails and fastenings.....	
3. do steel do	
4. Ballasting.....	
5. Repairs of bridges and culverts.....	
6. do and renewals of buildings.....	
7. do of fencing.....	
8. Clearing snow.....	
9. Engineering superintendence.....	
Total	

NO. 13, B.—OPERATING EXPENSES—WORKING AND REPAIRS
OF ENGINES.

	\$ cts.
1. Wages of engineers, firemen and cleaners.....	
2. Cost of coal for fuel.....	
do wood do	
3. Repairs of engines and tenders.....	
4. Oil, tallow, waste, etc., for engines.....	
5. Pumping engines.....	
6. Repairs of tools and machinery.....	
7. Superintendence.....	
Total	

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No. 13, C.—WORKING AND REPAIRS OF CARS.

	\$	cts.
1. Wages and materials for repairs of passenger cars.....		
2. do do do freight cars and snow ploughs.....		
3. Superintendence.....		
Total		

No. 13, D.—OPERATING EXPENSES—GENERAL AND OPERATING CHARGES.

	\$	cts.
1. Office expenses, including directors, auditors, management, travelling expenses, stationery, etc.....		
2. Station agents, clerks, porters, etc.....		
3. Conductors, baggagemen and brakemen.....		
4. Compensation for personal injuries.....		
5. Loss or damage to freight.....		
6. Cattle killed.....		
7. Cost of ferries and ferry-boats.....		
8. Cost of foreign agencies.....		
9. Small stores, including lights, lamps and signals.....		
10. All other charges.....		
11.		
12.		
13.		
Total		

Blanks are left for any other items of expenditure not included above.

No. 14.—SUMMARY OF OPERATING EXPENSES.

	\$	cts.
A. Maintenance of line, buildings, etc.....		
B. Cost of working and repairs to engines.....		
C. do do cars.....		
D. do general operating expenses.....		
Total cost of operating railway.....		

The above statement to include the full cost of operating the railway, and the total to correspond with the published return of the Company.

The following is a Statement of the date of each Accident, the place where it occurred, the train, the cause of the Accident, the extent of the injury to each person injured, and the name of such person.

Cause of Accident.	Passengers.		Employees.		Others.		Total.	
	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.
Fell from cars or engines.....								
Jumping on or off trains or engines when in motion.....								
Walking, standing, lying, sitting or being on track.....								
At work on or near the track, making up trains.....								
Putting arms or heads out of windows.....								
Coupling cars.....								
Collisions, or by trains thrown from track.....								
Explosions.....								
Striking bridges.....								
Total.....								

The following is a Statement of the date of each Accident, the place where it occurred, the train, the cause of the Accident, the extent of the injury to each person injured, and the name of such person.

Date.	Name and Place	Nature of Accident or Cause.

No. 16.—NAMES AND RESIDENCES OF DIRECTORS AND OFFICERS OF THE COMPANY.

Names of Directors.	Residence.
President.....	
Secretary and Treasurer. ..	
General Manager.....	
Engineer.....	
Superintendent.....	

The following is the official name and address of the Company :—

SCHEDULE TWO.

.....Railway of Canada.

RETURN of Traffic for the week ending 18
and the corresponding week, 18

Date.	Passengers.	Freight and Live Stock.	Mails and Sundries.	Total.	Miles Open.
18					
18					

Increase.....

Decrease.....

Aggregate Traffic from.....18.....

Date.	Passengers.	Freight and Live Stock.	Mails and Sundries.	Total.	Miles Open.
18					
18					

AMENDMENTS TO QUEBEC STATUTES.

DEBTS OF SUBSIDIZED RAILWAYS. (1)

CAP. XXXVI.

An Act to amend the law respecting railways, with reference to the payment of certain debts incurred in their construction and to the sale of such railways in certain cases.

[Assented to 27th February, 1893.]

HER MAJESTY, by and with the advice and consent of the Legislature of Quebec, enacts as follows :

1. The following subsection is added after subsection 19 of section twelfth of chapter third of title eleventh of the Revised Statutes :

" 19a. Debts contracted during the construction of a railway.

" 5181a. Every railway company, receiving subsidies from the Government of this Province, every contractor or sub-contractor, whether he be a chief contractor or sub-contractor of such railway, who employs foremen, workmen or laborers, by the job or for a specified time to fulfil the contract, must keep a list showing the names and wages or price allowed for the work of such foremen, workmen and laborers ; and every payment to them made must be attested by the signature or the mark of the foreman, workman or laborer, affixed before a witness, who signs the same.

" 5181b. It shall be lawful for any foreman, workman or laborer, or any person who has supplied to such company, con-

(1) " By a recent judgment of Pagnuelo, J., of the Superior Court of Quebec, a sequestrator was appointed for the Baie des Chaleurs Ry. Co. under this act. Leave has been granted to appeal from this decision. There may be doubts as to the powers of the Quebec Legislature to enact the 2nd section of this Act ; at least as regards railways under the jurisdiction of the Dominion Parliament.

tractor or sub-contractor, or to any person for them, labor or materials employed or to be employed in the construction of such railway, or who has given or sold one or more rights of way, to file in the office of the Commissioner of Public Works a claim under oath, made in the form indicated in schedule B.

"From the moment such claim is filed, the Commissioner of Public Works may, in his discretion, retain, out of the subsidy granted by the Legislature to the company, an amount sufficient to cover the claim until satisfied, unless the company or persons entitled to such subsidies consent to the payment of the claim by the said Commissioner out of the amount of such subsidies.

"When the claim is contested, the said Commissioner keeps an amount sufficient to pay the contested claim or claims until the matter is finally settled by the courts or settled by private agreement.

"**5181c.** Several unpaid foremen, workmen, laborers, suppliers of materials, or persons who have sold one or more rights of way, may join in the same claim.

"**5181d.** The assignment of the subsidies made by the company, or the assignment by a contractor or sub-contractor of the prices of work, in no wise affects the right conferred upon the persons mentioned in article 5181b to be paid out of the subsidies."

2. The Act 54 Victoria, chapter 37, is repealed, and the following articles are added after article 5183 of the Revised Statutes :

"**5183a.** When a railway company, subsidized by the Province, has become insolvent, and has not complied with the requirements of its charter, as regards the commencement or completion of its works within the time specified, or does not continue and has become incapable of continuing the undertaking or working of the road for more than thirty days, it shall be lawful for the Lieutenant-Governor in Council at any time, on the report of the railway committee of the Executive Council, to authorize the Commissioner of Public Works to cause the property of the company, including the interests it may have in the said road, to be sequestrated and sold.

"5183^b. The sequestrator is appointed by the Superior Court or by one of the judges of that court in and for the district in which the company's head office in this Province is situated, upon a petition in the name of the Commissioner of Public Works, not less than thirty days after the service of a copy thereof at the head office of the company, together with a notice stating the time and place at which it will be presented, and after the publication of a notice to that effect in the Quebec Official Gazette during such thirty days.

"The court or judge shall hear the shareholders and creditors on the appointment of the sequestrator, but shall not be obliged to follow their advice.

"5183^c. Such sequestrator has the same rights and is subject to the same obligations as a sequestrator in ordinary matters, and is subject to the summary jurisdiction of the court or judge.

"He may, at any time, be replaced, on the application of the creditors or of the Commissioner of Public Works, by following the same formalities as for his appointment.

"He takes possession of the road and of all the rolling stock ; executes and continues the work of the road, at the expense and in the name of the company ; executes, in the same manner, the contracts and acquittances, receipts and other documents, and, generally, performs all acts necessary for the construction, maintenance, administration and working of the railway until the company in default, or another company, lawfully substituted in the rights of the former, resumes and continues *bona fide* the fulfilment of its obligations.

"He may, with the permission of the court or judge, take out and defend any suits on behalf of the company.

"5183^d. If the company in default or any other company does not resume the construction, maintenance, administration and working of the road for the purpose of *bona fide* continuing the same, and if the sequestrator has not the means at his disposal for continuing them, on petition of the Commissioner of Public Works, thirty days' notice whereof shall be served upon the company by leaving a copy at its head office, with the indication of the time and place at which it will be presented, the

court or judge may order the sheriff of the district to seize and sell the road, immoveables used for the road and the rolling stock ;

" 2. The sheriff executes this order, by following the same rules as in the case of a writ *de terris*, and makes a return thereof to the Superior Court ;

" 3. All subsequent proceedings, including the distribution of moneys, are had before the Superior Court, and are the same and have the same effect as those relating to compulsory sale of immoveables.

" **5183e.** All proceedings instituted under the authority of this subsection are summary, and the parties have precedence for hearing over all other proceedings or cases."

3. This Act shall come into force on the day of its sanction.
(*For form see next page.*)

SCHEDULE B.

CLAIM OF FOREMAN, WORKMAN, LABORER, OR PERSON WHO HAS SOLD RIGHTS OF WAY OR SUPPLIED MATERIALS (*as the case may be*) FILED IN THE OFFICE OF THE COMMISSIONER OF PUBLIC WORKS.

To the Honorable the Commissioner of Public Works,

SIR,

In presence of the undersigned witness I (*or we*) (*name of the foreman, workman, etc., as the case may be*) declare that A. B. (*name of the company, contractor or sub-contractor, as the case may be*) owes me (*or us*) a sum of \$ _____ for (*indicate the nature of the work, etc.*), at (*place*), which sum the said A. B. (*name of the company, contractor or sub-contractor, as the case may be*), refuses or neglects to pay me (*or us*).

Made at _____, this _____ day of _____, 18 _____

(Signed) E. F.

(*Signature of workman or workmen.*)

(Signed), G. H.,

Witness.

SEIZURE OF RAILWAYS.

57 VIC. (QUE.) CAP. XLVIII.

AN ACT TO AMEND THE CODE OF CIVIL PROCEDURE.

[*Assented to 8th January, 1894.*]

HER MAJESTY, by and with advice and consent of the Legislature of Quebec, enacts as follows :

1. Article 638 of the Code of Civil Procedure is amended by adding the following clause to paragraph 3 thereof :

" If the property seized consists of a line of railway and its accessories, and such line has not been cadastred in accordance with article 5668 of the Revised Statutes, it is not necessary to indicate the numbers of the immoveables traversed by such railway, and it is sufficient if the name of the line and its terminal points be mentioned, so that its identity may be established."

2. Article 650 of the said Code is amended by adding thereto the following clause :

" However, when the seizure of a line of railway traversing several parishes or counties is concerned, such notice shall be given by the secretary-treasurer of each municipality."

3. Article 671 of the said Code, as it is contained in article 5937 of the Revised Statutes, is amended by adding thereto the following clause :

" Whenever the sale of a line of railway is concerned, such sale must be made at the office of the sheriff entrusted with the writ of execution."

4. Article 689 of the said Code is amended by adding the following clause after paragraph 3 thereof :

" In case the immoveable property seized and sold is a line of railway which is not cadastred, and the accessories thereof, it is sufficient to mention in the description the name of such line and its terminal points, so that its identity may be established."

5. This act shall come into force thirty days after its sanction.

CRIMINAL LAW AFFECTING RAILWAYS.

CANADA CRIMINAL CODE 1892.

Sec. 521. Criminal Breaches of Contract.

Every one is guilty of an indictable offence, and liable on indictment or on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, or to three months' imprisonment, with or without hard labor, who

(a) Wilfully breaks any contract made by him, knowing or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury ; or

.....
(c) Being under any contract made by him with a railway company, bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, or with Her Majesty, or anyone on behalf of Her Majesty, in connection with a government railway, on which Her Majesty's mails, or passengers, or freight are carried, wilfully breaks such contract, knowing, or having reason to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway ;

3. Every railway company which, being bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of its so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car, on the railway, is liable to a penalty not exceeding one hundred dollars ;

4. It is not material whether any offence defined in this section is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise.

Sec. 522. Posting up the Provisions of Law respecting Criminal Breaches of Contract.

Every.....such.....company shall cause to be posted up at the railway stations belonging to such company, a printed copy of this and the preceding section: in some conspicuous place, where the same may be conveniently read by the public; and as often as such copy becomes defaced, obliterated or destroyed, shall cause it to be renewed with all reasonable despatch;

2. Every such.....company which makes default on complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues;

3. Every person unlawfully injuring, defacing or covering up any such copy so posted up is liable, on summary conviction, to a penalty not exceeding ten dollars.

Sec. 250. Intentionally Endangering the Safety of Persons on Railways.

Everyone is guilty of an indictable offence, and liable to imprisonment for life who unlawfully—

(a) With intent to injure or to endanger the safety of any person travelling or being upon any railway:

(i) Puts or throws upon or across such railway any wood, stone, or other matter or thing;

(ii) Takes up, removes or displaces any rail, railway switch, sleeper or other matter or thing, belonging to such railway, or injures or destroys any track, bridge or fence of such railway, or any portion thereof;

(iii) Turns, moves or diverts any point or other machinery belonging to such railway;

(iv) Makes or shows, hides or removes any signal or light upon or near to such railway;

(v) Does or causes to be done any other matter or thing with such intent; or

(b) Throws, or causes to fall, or strike at, against, into or upon any engine, any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in and upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train of which such first mentioned engine, tender, carriage or truck forms part.

Sec. 489. Mischief on Railways.

Everyone is guilty of an indictable offence, and liable to five years' imprisonment, who, in manner likely to cause danger to valuable property, *without endangering life or person* :

(a) Places any obstruction upon any railway, or takes up, removes, displaces, breaks or injures any rail, sleeper or other matter or thing belonging to any railway ; or

(b) Shoots or throws anything at an engine or other railway vehicle ; or

(c) Interferes without authority with the points, signals or other appliances upon any railway ; or

(d) Makes any false signal on or near any railway ; or

(e) Wilfully omits to do any act which it is his duty to do ; or

(f) Does any other unlawful act ;

2. Everyone who does any of the acts above mentioned, with *intent* to cause such danger, is liable to imprisonment for life.

Sec. 490. Obstructing the Construction or Use of any Railway.

Everyone is guilty of an indictable offence, and liable to two years' imprisonment, who, by any act or wilful omission, obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance, or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith.

Sec. 491. Injuries to Packages in Custody of Railways.

Everyone is guilty of an offence, and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged, or to one month's imprisonment, with or without hard labor, or to both, who :—

(a) Wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building, or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal, or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or

(b) Unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof.

Sec. 421. Punishment of Forgery.

Everyone who commits forgery of the documents hereinafter mentioned is guilty of an indictable offence, and liable to the following punishment :

(c) *To seven years' imprisonment*,—if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as—

(m) Any ticket or order for a free or paid passage on any carriage, tramway or railway, or on any steam or other vessel.

Sec. 362. Obtaining Passage by False Tickets.

Everyone is guilty of an indictable offence, and liable to six months' imprisonment, who, by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any carriage, tramway or railway, or in any steam or other vessel.

Sec. 351. Stealing on Railways.

Everyone is guilty of an indictable offence, and liable to fourteen years' imprisonment, who steals anything *in* or *from* any railway station or building, or from any engine, tender, or vehicle of any kind on any railway.

Sec. 330. Stealing Railway or Steamboat Tickets.

Everyone is guilty of an indictable offence, and liable to two years' imprisonment, who steals any tramway, railway or steamboat ticket or any order or receipt for a passage on any railway or in any steamboat or other vessel.

Sec. 514. Treatment of Cattle while in Transit by Rail or Water.

No railway company within Canada, whose railway forms any part of a line of road over which cattle are conveyed from one province to another province, or from the United States to or through any province, or from any part of a province to another part of the same, and no owner or master of any vessel carrying or transporting cattle from one province to another province, or within any province, or from the United States through or to any province, shall confine the same in any car or vessel of any description, for a longer period than twenty-eight hours, without unloading the same for rest, water and feeding, for a period of at least five consecutive hours, unless prevented from so unloading and furnishing water and food, by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains ;

2. In reckoning the period of confinement, the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting railway or vessel from which they are received, whether in the United States or Canada, shall be included ;

3. The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water ;

4. Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or, in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof. And such company, owner or master shall in such case have a lien upon such cattle, for food, care and custody furnished, and shall not be liable for any detention of such cattle ;

5. When cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company, then having charge of the cars in which they have been transported, shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean sawdust or sand, before reloading them with live stock ;

6. Every railway company, or owner, or master of a vessel, having cattle in transit, or the owner or person having the custody of such cattle, as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions of this section, is liable for every such failure on summary conviction to a penalty not exceeding one hundred dollars.

Sec. 515.

Any peace officer or constable may, at all times, enter any premises where he has reasonable ground for supposing that any car, truck or vehicle, in respect whereof any company or person has failed to comply with the provisions of the next preceding section, is to be found, or enter on board any vessel in respect whereof he has reasonable ground for supposing that any company or person has, on any occasion, so failed ;

2. Everyone who refuses permission to such peace officer or constable is guilty of an offence, and liable, on summary conviction, to a penalty not exceeding twenty dollars, and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment.

AN ACT RESPECTING THE SALE OF RAILWAY PASSENGER TICKETS.

REVISED STATUTES OF CANADA, CHAPTER 110.

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Any railway company subject to the jurisdiction of the Parliament of Canada, or to which "*The Railway Act*" applies, and the Minister of Railways and Canals, as respects any railway under the control of the Government of Canada, may appoint, in any city, town or village in Canada, such person or persons as it or he chooses, as agents for the sale of passenger tickets to passengers or persons who desire to travel by the railway of the company employing such agent, or by any Government railway, as the case may be.

2. The Minister of Railways and Canals, or company employing any such agent, shall give him a certificate of his appointment, which shall be under the hand of the Minister of Railways and Canals, or the corporate seal of the company appointing him; and such agent shall keep the same framed or exhibited in some conspicuous part of his office or place of business, where it can be seen and read by those resorting to the office.

3. Every agent of a foreign railway company doing business in Canada shall, before issuing tickets over any Government railway line, or other Canadian railway line, be duly authorized for such purpose by the Minister of Railways and Canals, or by the company, as the case may be, over whose line he desires to issue tickets, in the same manner as is hereinbefore provided in respect of other agents, and shall have and exhibit, in like manner, a certificate from the foreign company he represents.

4. Every ticket sold by any agent shall have the name of such agent and the date of the sale written or stamped plainly upon it, and every person who fraudulently alters, changes or imitates such signature or date is guilty of an offence against this Act.

5. Nothing in this Act shall prevent the duly authorized agent of any company from procuring from the duly authorized agent of any other company, a ticket for a passenger to whom he has sold a ticket to travel over the line or any part thereof for which he is the authorized agent, so as to enable such passenger to travel to the point or junction from which he has previously secured his ticket.

6. Nothing in this Act contained respecting the appointment of agents for the sale of tickets shall prevent the station agents of the Minister of Railways and Canals or company, at their stations, and in their ticket offices at such stations, from selling tickets to passengers about to enter upon and travel by railway from the said stations.

7. No person, except those authorized as above mentioned, shall sell or offer for sale any railway passenger ticket, or pass, ticket, certificate or other instrument, enabling any person or purporting to entitle any person to travel on any one railway, or more than one railway, or on any part of one railway, or parts of several railways to which this Act applies.

8. Every person guilty of an offence against this Act shall, upon summary conviction thereof, before any justice of the peace, be liable to a penalty not exceeding fifty dollars, and not less than twenty dollars and costs, or to imprisonment for a term not exceeding ninety days, and not less than ten days, or to both penalty and imprisonment, in the discretion of the justice.

9. The Minister of Railways and Canals, with respect to any Government railway and every railway company subject to the jurisdiction of the Parliament of Canada, or to which "*The Railway Act*" applies, as the case may be, shall repay to every holder of a ticket over any Government railway line or other Canadian railway line, as the case may be, the cost of his ticket, if unused in whole or in part, less the ordinary and regular fare for the distance for which such ticket has been used ;

2. Such repayment shall be made at any station or office of the railway or company between and including the points covered by the ticket ;

3. The claim for such redemption shall be made within thirty

days from the expiration of the time for which the ticket was issued, in accordance with the conditions thereon ;

4. The sale by any person of the unused portion of any ticket otherwise than by the presentation of the same for redemption, as provided for in this section, is an offence against this Act, and shall be punishable as herein provided.

10. Every passenger who presents a single journey ticket upon a train within the time for which the conditions printed upon such ticket and the date shows such ticket to be good for use, may apply to the conductor of such train to have the privilege of stopping over granted, and the time for which the ticket is valid extended, which shall be conceded on tickets purchased at railway ticket offices in Canada, from one place in Canada to another, or from a place in Canada to a place in the United States ; but no such passenger shall be entitled to have such time extended for more than two days for every fifty miles of distance to be travelled in Canada.

11. Every complaint respecting an offence against this Act shall be prosecuted under the provisions of the "*Act respecting summary proceedings before Justices of the Peace.*"

12. The examination or deposition of any complainant or witness, taken or heard under oath in the presence of the person accused, on the hearing of any complaint for any offence against this Act, may, if the person charged, or his counsel or agent, has had the opportunity of cross-examining such complainant or witness, whether he has done so or not, be used in evidence on the hearing of any appeal from any decision of the justice of the peace before whom the trial was had, if the person whose examination or deposition is so used is out of the jurisdiction of the court to which the appeal is made, and if the said examination or deposition has been reduced to writing and has been signed by the person whose examination or deposition it purports to be ;

2. The said examination or deposition may be read and taken as evidence on the hearing of such appeal, upon the production of the certificate of the justice of the peace before whom the trial was had, under his hand, setting forth that the said examination or deposition which is offered in evidence was taken before him on the hearing of the complaint which forms the subject matter of the said appeal.

FORMS OF PROCEEDINGS IN EXPROPRIATION.

ARBITRATION NOTICE, SURVEYORS' CERTIFICATE AND NOTICE OF APPLICATION TO COUNTY JUDGE.

In Re : _____ RAILWAY COMPANY.

Province of _____, County of _____
Municipality of the _____
To _____
of the _____ of _____ owner of the property
hereinafter described.

You are hereby notified, under the provisions of "*The Railway Act*," and amendments :

1. That the _____ Railway Company
requires for the purposes of its Railway certain lands in
the _____ of _____ belonging to
you, shown on the map or plan deposited in the office of the
Clerk of the Peace for the said County, under the location
No. _____ and particularly described as follows :

All that portion of lot number _____ in
of the said _____ of _____ containing by admeasurement
_____ acres and _____ of an acre.

2. The said Company is ready and willing and hereby offers
to pay to you the sum of _____ as
compensation for such lands and all damages in respect of the
taking thereof, for the purposes of the Company, and in the
exercise of the powers conferred upon it by its charter and the
said Act and amendments.

3. The Company appoints _____ of
_____ its arbitrator, if its said offer is not
accepted by you.

4. Application will be forthwith made in accordance with the
notice endorsed hereon.

Dated at _____ day of _____ 18

Solicitors for

Railway Company.

Certificate of Provincial Land Surveyor.

I, _____ of _____ in the
County of _____ a sworn Provincial Land
Surveyor of the Province of _____, disinterested in this
matter, do hereby certify as follows :

1. That the above described parcel of land shown on the Map or Plan of the said Railway is required for said Railway.
2. That I know the said parcel of land and the amount of damage likely to arise from the same being taken for the line and purposes of the said Railway, as aforesaid.
3. That the sum offered in and by said notice is, in my opinion, a fair compensation for the said land and for the damages as aforesaid.

As witness my hand the _____ day of _____ 18
Provincial Land Surveyor.

(ENDORSATION.)

Notice of Application Referred to in the Fourth Paragraph.

You are also required to take notice that because the said
the _____ Railway Company requires the
immediate possession of the land within referred to, which is
necessary to carry on part of the said Railway, with which the
said Company is ready forthwith to proceed, application will be
made to the Judge of the County Court, of the within-named
County, at the Court House of the said County, on the
_____ day of _____ at the hour of _____ o'clock
in the _____ noon, for his warrant to the Sheriff of the said
County to put the said Company in possession of the said lands,
under the provisions of The Railway Act, which will issue, unless
you, on that occasion, or in the meanwhile, show good cause to
the contrary.

Solicitors for _____ Railway Company.

Affidavit.

County of

In the matter of the
to wit: } Railway Company and

of the Township of

and

part of
in the

Lot number
Concession of the

Township of

;

I

of the
in the County of

of

make oath and say as follows :

1. That I am of the
Railway Company, and am acquainted with the state and position of the Company's work, and what is required in respect of the same.

2. That the Company require immediate possession of the lands above mentioned, and which are shown on the maps and plans and book of reference, duly filed with the Clerk of the Peace for the said County ; and that such possession is necessary to carry on a part of the said railway with which the Company are ready to forthwith proceed.

3. That a notice of arbitration and surveyor's certificate under the provisions of the Railway Act have been duly served on the said
and the amount mentioned in the said notice and certificate was tendered to the said
but he refused to accept the same, and stated that he would resist the said Company taking possession of the said lands.

4. That the said Company are ready to give security to the satisfaction of the Judge of the County Court, in accordance with the provisions of the Railway Act.

Sworn before me at the

in the County of

day of

A.D. 18

}

A Commissioner of the Court of B.R., etc.

Notice to Desist.

In the matter of the Railway Company
and

You are hereby notified that the
Railway Company desist from the notice of arbitration herein
given on the day of
herein, and that new notice of arbitration is served herewith.

Solicitors for the *Railway Company.*
To
his Attorney. _____

Warrant from Judge of the County Court.

County of } In the matter of the
to wit : } Railway Company
} of
in the Township
of and part of Lot number
in the Concession of the Township of
I, of the
Esq., Judge of the County Court of the County of
to of the
of the said County, send GREETING :

By virtue of the special Acts incorporating said Company,
and of the authority in me vested by the Railway Act, and being
satisfied by affidavit in that behalf that the immediate possession
of the lands mentioned in the notice, served on the said
on the day of A.D. 18 ,
and hereinafter specified, is necessary in order to carry on some
part of the Railway of the Railway
Company, with which the said Company are ready forthwith to
proceed, and the said Company having given security to my
satisfaction, by the deposit in the Bank of
a sum double the amount mentioned in the said notice, I com-
mand you that without delay you do put the
Railway Company, their agent and servants, in possession of
that part of Lot in the Concession of the

Township of _____ in the County of _____
shown on the map or plan of said Railway and required by the
said Company for the purposes of their Railway, and put down
all resistance or opposition thereto, taking with you sufficient
assistance for such purpose.

Dated the _____ day of _____ A.D. 18

Given under my hand and seal
Judge of the County Court of the County of _____

Notice of Application to Judge.

For appointment of Third Arbitrator.

County of _____ } In the matter of the
to wit : } Railway Company and
_____ } *Proprietor.*

Whereas _____ and _____ Arbitrators,
respectively appointed by the parties hereto, are unable to agree
upon a third Arbitrator to act with them in this matter.

You are hereby requested to take notice that application will
be made to His Honor, the Judge of the County Court of the
County of _____ at his Chambers in the Court House,
in the _____ in the said County, at
noon, on _____, the _____ day of _____,
A.D. 18 _____, to nominate and appoint such third Arbitrator in
accordance with the Railway Act.

Dated this _____ day of _____ A.D. 18

To _____
and _____ } *Solicitors for Railway Company.*
Attorney. }

Appointment of Third Arbitrator.

County of _____ } In the matter of the
to wit : } Railway Company and
_____ } Lot number _____

and part of _____
in the Township of _____ in the County of _____

The Arbitrators herein duly appointed by the
Railway Company and _____

FORMS OF PROCEEDINGS IN EXPROPRIATION. clxvii

above named, being unable to agree upon a third Arbitrator, and due notice having been given under the provisions of the Railway Act, and on the application of the Company, I

Judge of the County Court of the County of
by virtue of the authority in me vested by the provisions of the Railway Act, do hereby appoint of
to be the third Arbitrator herein.

Award.

The Railway Company.
Know all men by these presents, that , and ,
and , of , being the Arbitrators
appointed pursuant to the provisions of the Railway Act, having
duly taken upon ourselves the duties of our said office, and hav-
ing proceeded conformably to said Act, to ascertain the com-
pensation to be paid by said Company for the following parcel
of land, taken by the said Company for the purpose of its Rail-
way, that is to say—
do hereby order, award and adjudge that the sum of
dollars shall be paid by this Company, as and for and in full of
such compensation for the said land and all damages in respect
thereof.

As witness our hands and Seals this day
of A.D. 18
Signed, sealed and delivered, }
in presence of }

Agreement for Right of Way, &c.

This agreement, made this day of
in the year one thousand eight hundred
and between
of the of in the
County of and the
Railway Company, as follows:

1. The said agrees to sell and
convey to the said Company, by a proper Deed, with Bar of

Dower, and free from incumbrances, so much of Lot number
in the Concession of
the Township of in the County of
as is taken or required by the Company
for its line of Railway, and containing acres,
more or less, for the sum of being the price of the
said land, and all damages in respect thereof.

2. The Company agrees to prepare, as its own expense, the
necessary Deed of said land, and to pay the said sum of
within days from this date.

3. The Company is at liberty to take possession of said land
forthwith, for the purposes aforesaid.

Witness,

FORMS OF PROCEEDINGS IN EXPROPRIATION,
QUEBEC.

Arbitrator's Award.

THE RAILWAY COMPANY,
and *Expropriated Party.*

The day of
before the undersigned Notary,
appointed for the Province of Quebec, residing and practising
in

Appeared

1. of Arbitrator,
appointed by the Railway Company of
the First Part.

2. of Arbitrator,
appointed by of
Party Expropriated, of the Second Part.

3. And of

third Arbitrator duly appointed by the said two arbitrators (or by the Court).

Which said Arbitrators and third Arbitrator report and declare as follows :—

That after notice given, according to law, to the said (the Railway Company) and to the said (the party expropriated), we, the Arbitrators and third Arbitrator, met at

on the day of and
being there duly sworn, in presence of the parties interested, we commenced proceedings by visiting the land expropriated belonging to the said and described as follows :

(here follows description of land).

After having examined the papers of record produced by the said Company and by the said expropriated party, having sworn and examined the witnesses produced by each party, the parties being represented by their respective Counsel, to wit :—the Railway Company by and the said

expropriated party, by ; having obtained all the information necessary and having examined the said expropriated party, we are agreed (the said dissenting) that the said

expropriated party has a right to the sum of as a fair compensation for the strip of land above described and taken by the said Company for their Railway, this sum including all damages caused by the expropriation of the said property, and the exercise of the powers of the Railway Company thereon.

We the said Arbitrators and third Arbitrator therefore award to the said the said sum of which he has a right to recover from the said (the Railway Company).

The said (dissenting Arbitrator) declares that he does not concur in this award, and that he signs only to place his dissent on record.

Done and passed at etc.

(Signatures of the three Arbitrators and Notary.)

FORMS OF PROCEEDINGS IN EXPROPRIATION. clxxi

said had due notice, the said Company therein and thereby declaring their willingness to give the security required by law to entitle them to such warrant.

And whereas on the day of after hearing the said parties to said Petition, to wit, the said Company and the said I did grant the prayer of the said Petition, and ordered the said Company to deposit in the Bank of in the

City of the sum of to the credit of the said Company and of said jointly, and to await the further order herein.

And whereas said Company has, as appears by the receipt filed herein, deposited said sum. These are therefore to command you, that you do put the said

Railway Company in immediate possession of the said strip piece or parcel of land so hereinbefore described and required in the construction of said Railway, and that you do put down all resistance and opposition to such possession, and for so doing this shall be your authority.

Herein fail not.

Given under my hand and seal of said Court at this day of in said district of

Certificate of Bank Cashier.

I, the undersigned, Cashier of the Bank at certify by these presents that the Railway Company has to-day deposited in this Bank the sum of , and that this sum is at the joint credit of the said Company and of of and that said sum will be paid only upon the order of the Superior Court for the district of

Done and signed in duplicate at this day of

(Signature of Cashier).

SPECIAL FORMS FOR THE PROVINCE OF
QUEBEC.

Notice of Expropriation.

Province of Quebec, }	No.
District of }	

In the matter of
The Railway Company, and proprietor,
to
of the of proprietor.

Take notice that part of certain lot of land
and premises in your possession, known and distinguished on
the Official Plan and Book of Reference of the
of in the of
as lot number described as
lot No. on the map or plan and book of refer-

ence of the said railway, required from you by the
Railway Company, for the purposes of their Railway, and
will be taken under the provisions of The Railway Act, viz.:
part of said Lot No. described as follows :—

.....
That the said Railway Company are ready and
willing, and hereby offer, to pay the sum of
dollars as a compensation for the said land and for all damages
caused to you by the exercise of their franchises thereon.

That in the event of your not accepting this offer the
Railway Company hereby nominate and appoint
to be their Arbitrator for the purpose of ascertain-
ing the compensation to be paid to you for the said land and
damages, in accordance with the Railway Act.

Montreal, 18

I, _____ Secretary _____ Railway Company.
of the _____
in the _____

a sworn Surveyor for the Province of Quebec, do hereby certify :

1. That I am disinterested in the matter within referred to.
2. That the land lastly within described is required for the
Railway.
3. That I know the lot of land and premises in question and
the amount of damages likely to arise from the exercise of the
powers of the said Railway Company thereon.
4. That the sum offered by the _____ Railway Com-
pany in the within notice is a fair compensation for the same and
for all damages as aforesaid.

Dated at _____ the _____ day of _____ 18

Province of Quebec, }
District of _____
In the matter of The _____

Railway Company, and
Proprietor,

I, _____ make oath and say, that I did
of the _____ day of _____ 18
on the _____
personally serve
with a duplicate original of the within Notice and of the Sur-
veyor's certificate endorsed thereon.

Sworn before me at _____ }
in the _____ of _____
this _____ day of _____ A.D. 18

Petition for Warrant of Possession.

Canada, }
Province of Quebec, } IN THE SUPERIOR COURT.
District of Montreal. }

The _____ Railway Company, petitioners to obtain
possession of property, and _____ proprietor.

To any one of the Honorable Judges of the Superior Court: for
Lower Canada, sitting in and for the District of Montreal:—

That the said _____ the Proprietor

That the map or plan and book of reference for the

'That on the day of eighteen hundred
and eighty- notice of the deposit of the said map or plan
and brok of reference was given in one newspaper published
within the said district, to wit, in the City of Montreal; and
that after the expiry of ten days from the said deposit, and from
the said notice thereof, application was made to the said proprietor
for a conveyance to the said Petitioners of the land required
for the right of way of the said railway as described upon the
said map or plan and book of reference, to wit, as follows:—

That on the _____ day of _____ the said Company caused to be served upon the said proprietor a notice containing a description of the said land so to be taken for the said Railway, a declaration of their readiness to pay to the said Proprietor _____ the sum of _____ dollars, as compensation for the said land, and for any damage caused to the said Proprietor _____ by the construction of the said railway, and the name of the person, to wit,

to be appointed as the arbitrator of the said petitioners if their offer should not be accepted. And such notice was accompanied by the certificate of a sworn Surveyor of the Province of Quebec, to wit,

of the he being disinterested in the matter and not being the arbitrator named in such notice, by which certificate it was declared that the said land so shown as aforesaid on the said map or plan and book of reference was, and is, required for the said railway; that he (the said Surveyor) knows the land and the amount of damage likely to arise to the Proprietor

by the exercise of the powers of the said Company, the petitioners, and that the said sum of dollars, was, and in his opinion is, a fair compensation for the said land and for the said damages.

That as appears by the affidavit of hereto annexed, the immediate occupation of the said land is necessary to carry on the construction of that portion of the said railway crossing the said land, and that the Company, the Petitioners, are ready forthwith to proceed with such construction.

That the said Company Petitioners are ready and willing to give security to the satisfaction of your Honor, by depositing in a chartered bank to be indicated by your Honor, to the credit of the said Company, the Petitioners, and of the said Proprietor

jointly, such sum of money as shall be ordered by your Honor in that behalf;

Wherefore the Company Petitioners, praying *acte* of their readiness to give security as aforesaid by depositing such sum as your Honor may deem fit; further pray that your Honor may be pleased to order that a warrant do issue to the Sheriff, or to any Bailiff of the District of Montreal, as your Honor may deem fit, to put the Company Petitioners in immediate possession of the said portion of the said lot, in order that they may carry on the construction of that portion of their railway which will pass over the said lot of land, pending such arbitration; and that by the said warrant the Sheriff or Bailiff, as the case may be, be authorized to put down any resistance or opposition that may be offered, and for that purpose to take with him sufficient assistance; the whole with costs *à qui de droit*.

Montreal,

I, _____ of the city of Montreal, the
 Railway Company, above named, the Petitioners, being duly
 sworn, depose and say :

That I have taken communication of the foregoing Petition,
 and that all the matters and things therein set forth and contain-
 ed are true ;

That the immediate possession of the lands of the said pro-
 prietor _____ described therein is necessary to carry on
 a part of the Railway of the said Company, Petitioners, with
 which they are ready forthwith to proceed.

And I have signed.

Sworn before me at Montreal,)
 this _____ day of _____
 A.D. 18 _____ }

To

proprietor in the foregoing Petition named :

Take notice of the foregoing Petition, and that the same will
 be presented for allowance to some one of the Honorable Judges
 of Her Majesty's Superior Court for Lower Canada sitting in
 Chambers in and for the District of Montreal, on the
 day of _____ at 10.30 of the clock in the forenoon, or so
 soon thereafter as Counsel can be heard.

Montreal, _____ 18 .

Attorney for Petitioner.

Agreement to Sell.

I, _____ of _____
 hereby agree to sell to the _____ Railway Company,
 the portion of my property, being number _____
 of the official plan and book of reference of the Parish of _____
 which is shown on the map or plan of the Railway
 of the said Company under the number _____, as being
 required for such Railway, being a strip of land _____ feet
 long by _____ wide, across my said property, as shown
 by the said map or plan, containing _____ arpents and
 hundredth of an arpent

The price to be payable in cash upon the execution of a deed of sale of the said right of way, such price to cover all claims for damages caused to my property by the Railway. And pending the execution of a deed of sale of the said land, for the purpose of which I will furnish my title deeds to the said Company forthwith, I consent to the said Company proceeding with its works thereon.

In witness whereof, I have executed these presents at
 , in the said this day of 189

In presence of }

Notarial Deed of Sale.

No. 18 }
 Sale by
 to "The Railway Company."

On this day of one thousand eight hundred and , before me, he undersigned notary, duly admitted and sworn in and for the Province of Quebec, practising

Appeared:
 hereinafter called the vendor.

And the Railway Company, a body corporate, having its chief office in the said City of hereinafter called the "Purchasers," and herein acting by their of the said city of Montreal, Esquire, and duly authorized for the purpose hereof:

Who declared unto me, the said notary, as follows:

Whereas the piece of land, hereinafter described, is required for the construction of the Railway, which the Purchasers are empowered to make, and complete, and operate under and by virtue of their Act of incorporation.

And whereas the vendor has promised to sell, convey and transfer to the Purchasers the said piece of land, subject to the conditions hereinafter mentioned.

Now, therefore, these presents, and the said notary, witness :

That the vendor

declare to have sold and conveyed, and by these presents do sell and convey with warranty against all gifts, dowers, mortgages, substitutions, servitudes and other encumbrances whatsoever to the Purchasers, accepting by their executive officer above named.

A certain parcel or tract of land situate in the parish of
county of ; measuring
feet in width, by about feet in length, English measure, and forming a total area of
known and designated under the number on
the location plan of the said railway, duly fyled according to law.

The hereby sold piece of land, being a portion of lot number
on the official plan and Book of Reference of the
and being more particularly described as

follows :—

.....
of which the Purchasers declare to have a perfect knowledge, as
having seen and viewed the same, and with which they are satisfied.

The vendor lawfully seized thereof by virtue of sufficient
title, as having acquired the same.....

.....
To have and to hold the aforesaid bargained and sold piece of
land unto the purchasers, their representatives and assigns forever.

And in consideration of the said sale and of the release of the
Purchasers from any claim for compensation for damages arising
from the exercise of the powers of the Company upon the piece
of land hereby conveyed as hereinafter contained ; the Purchasers bind and oblige themselves to pay the sum of

dollars, which said sum.....

.....
And in consideration of the said sum, the vendor do
hereby also covenant that the Purchasers may construct and operate a railway on the said land, and in respect of such railway, may exercise on the said land such powers as may be conferred on them by law, without any claim for damages on account there-

of; and the vendor hereby release the Purchasers from all such claims :

The vendor further declare that the hereby sold land is free and clear of all mortgages and encumbrances.

This sale is further made subject to the following clause and condition, viz.:

1. That the Purchasers shall erect and maintain on each side of the Railway, proper fences, so far as they are required by the Railway Act, and, further, shall construct, for the vendor, across the said land, at a place to be decided upon by the purchasers, a convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles, together with such openings, or gates, or bars, with fastenings as are required by law; the Purchasers being not bound to construct any other crossing across the said property; the said vendor hereby renouncing the right thereto, as well for himself as for his heirs or assigns.

And to these present ha intervened the following parties to wit:

1. Dame
wife of the said vendor
duly authorized by him to all the intents and purposes hereof;
who, in consideration of the premises, doth renounce, as well for herself as for her children born, or to be born of her marriage with the said vendor, to all dower, either prefix or customary and to all hypothecary claims for dower or matrimonial rights, and for all other rights and claims which she or her children may have or could pretend in and upon the piece of land hereby sold; either by law, by contract of marriage, or otherwise.

.....
The vendor shall have no expenses to pay in respect of and under the present sale, except the costs of the certificates from the Registry Offices.

And as security for the payment of the said sum of dollars as hereinbefore agreed and of the interest thereon, the hereby sold property is hypothecated in favor of the creditor thereof.

And for the execution of these presents, the said parties have elected their domicile at the place above mentioned.

Done and passed on the day and year
first above written, under number thousand
hundred and and signed by the
aforesaid parties with the undersigned Notary, after these pre-
sents were first duly read over.

y and year
thousand
ned by the
these pre-

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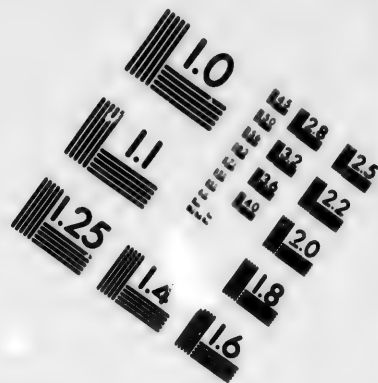
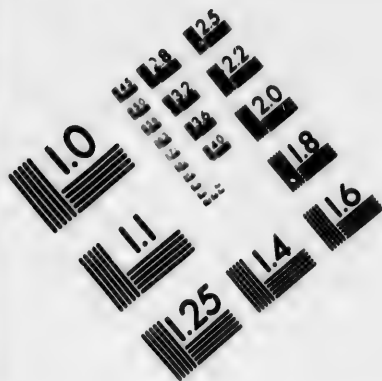
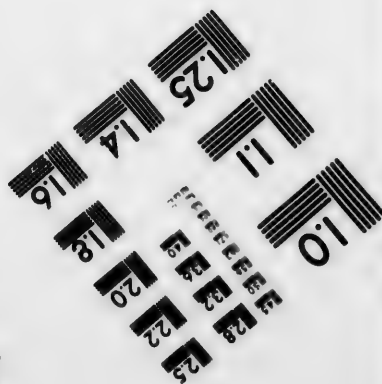
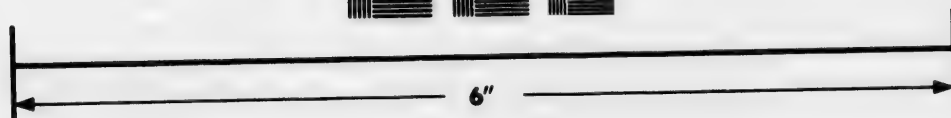
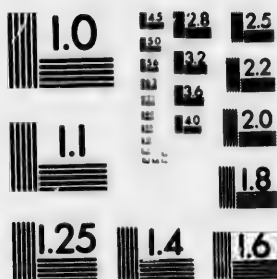


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

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